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The Creation of Constitutions in Canada and the United States

by Richard S. Kay*

I. INTRODUCTION

This essay examines the process by which constitutional change came to Canada in 1980-82 and the relevant criteria of law and politics against which that process and its results may be judged. The same kinds of questions may be asked about the creation of the basic constitutional rules in any legal system, but rarely have these issues been exposed with such force and clarity as in the recent events in Canada. To illustrate the universality of these questions, and further to illuminate the factors which bear upon them, a parallel inquiry will be made into the events leading to the institution of the Constitution of the United States in 1787-89. In each case, it will be critical to distinguish two kinds of evaluations, one based on conformity of the constituent process with existing positive law—legality; the second based on its social and political acceptability—legitimacy.

II. THE CANADIAN CONSTITUTION, 1982

In the fall of 1981, Canada's protracted constitutional debate reached a climax in an agreement among the governments of nine provinces and the federal government concerning the contents of a package of amendments to the British North America Acts.¹ These amendments contained two principal features. They entrenched in the Constitution of Canada a Charter of Rights and Freedoms limiting the powers of both the federal Parliament and the provincial legislatures to impinge on certain protected liberties.² They also established a set of procedures for the further amendment of the Constitution. These procedures required (depending

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¹ S. DUNN, *THE YEAR IN REVIEW 1981: INTERGOVERNMENTAL RELATIONS IN CANADA* 30 (1982).

² Constitution Act, 1982 §§ 1-34.

on the subject matter of the amendment proposed) the approval of some combination of federal and provincial legislative bodies.³ For a significant category of constitutional amendments, these new arrangements replaced the awkward and embarrassing practice of effecting constitutional changes by securing the enactment of a statute in the Parliament of the United Kingdom. Now, as a matter of law, all Canadian constitutional change may be accomplished by Canadian political institutions. The package of amendments thus achieved what had been desired and discussed for fifty years, the "patriation" of the Canadian Constitution.

As a formal matter these changes were brought into effect by a proclamation of the Queen on April 17, 1982.⁴ The Queen's authority so to proclaim was granted by the Constitution Act, 1982. That Act, in turn, was given the force of law in Canada by the Canada Act which was passed by the British Parliament on March 29, 1982.⁵ That British statute was a response to a joint address to the Queen from the houses of the Canadian Parliament which was approved by resolutions passed by the Canadian Senate and House of Commons in December 1981.⁶ However, it is broadly acknowledged that all of these actions were little more than the execution of the substantive decisions agreed to by the ten heads of government the previous November.⁷ Since the political process that produced that agree-

³ Constitution Act, 1982 §§ 38-49. The Act imposes different amending procedures for different sections: The "general" amending procedure is defined in § 38(1). Under § 38(1), amendments relating to federal parliamentary authority, the principle of proportionate representation and certain other matters (specified in § 42(1)) can be effected by resolutions of both houses of the Federal Parliament and resolutions of the legislative assemblies of two-thirds of the provinces. Section 38(2) provides that if amendments derogate from provincial legislative powers, they must have the approval of a majority of the memberships of the legislative bodies specified in § 38(1). Moreover, any provincial legislative assembly may, by resolution approved by a majority, exclude that province from an amendment's effect. Section 41 requires unanimous approval by the legislative assemblies of the provinces and the federal Senate and the House of Commons for amendments relating to the offices of Queen, Governor-General and provincial Lieutenant-Governors, certain minimal provincial representation in the Federal Parliament, the use of the English or French language, the composition of the Supreme Court of Canada and the amending formulas themselves. Under § 43, amendments concerning, inter alia, provincial boundaries and intra-provincial language matters must be approved by the houses of the Federal Parliament and the legislative assemblies of the provinces involved. Amendments not otherwise covered, dealing with the governmental machinery of either Canada or a province, may be effected, under §§ 44 and 41, by the approval of the relevant legislature alone. See generally Cheffins, *The Constitution Act, 1982 and Amending Formula: Political and Legal Implications*, 4 SUP. CT. L. REV. 43 (1982); Scott, *Pussycat, Pussycat or Patriation and the New Constitutional Amendment Process*, 20 W. ONT. L. REV. 24 (1982).

⁴ Can. Gaz. (Part I), vol. 116, No. 17, at 2927-28.

⁵ Canada Act, 1982.

⁶ The Resolutions were adopted on Dec. 2, 1981 in the House of Commons, VOTES AND PROCEEDINGS No. 268, 32nd Parl., 1st Sess. 4304, 4308 (1981), on Dec. 8, 1981 in the Senate, MINUTES OF PROCEEDINGS OF THE SENATE No. 162, 32nd Parl., 1st Sess. 1722, 1759 (1981).

⁷ Following the November 10, 1981 agreement, the nine consenting provincial premiers and the federal government assented to certain changes in the Charter of Rights and Free-

ment has been the subject of extensive commentary,⁸ a brief outline of the salient events should suffice.

Since the confederation of the British colonies in North America in 1867, governments in Canada have operated under legal limitations imposed by a British statute of that year, the British North America Act (BNA Act).⁹ Because the BNA Act provided no general mechanism for amendment by Canadian authorities, changes in those legal limits ordinarily had to be effected by further British legislation (usually amendments to the BNA Act) enacted in response to requests from Canada.¹⁰ As Canadian political independence from the United Kingdom came to be increasingly recognized in the twentieth century, the unseemliness of this procedure became more evident. A series of federal provincial conferences were convened to seek agreement on a domestic amending procedure¹¹ but all failed.

In the wake of the unsuccessful referendum in Quebec on "sovereignty-association" in May 1980,¹² another such conference met in October 1980. After the October 1980 conference also failed to agree on constitutional reform, the federal government announced its intention to request from the United Kingdom Parliament the enactment of a constitutional Charter of Rights and Freedoms and a domestic constitutional amending procedure. This request would issue whether or not the provin-

doms strengthening the protections of native groups, banning official discriminations based on gender and altering the circumstances in which a province opting out of a constitutional amendment was entitled to financial compensation. The accord, so modified, was faithfully followed by the enacting authorities. S. DUNN, *supra* note 1, at 31. The only other serious question raised was the opposition of the government of Quebec. *See infra* notes 208-17 and accompanying text. Apart from the change in compensation mentioned, this did not result in any changes in the November agreement.

* *See, e.g., AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT* 28 (K. Banting & R. Simeon eds. 1983); S. DUNN, *supra* note 1; R. ZUKOWSKY, *STRUGGLE OVER THE CONSTITUTION: FROM THE QUEBEC REFERENDUM TO THE SUPREME COURT*, 2 *INTER-GOVERNMENTAL RELATIONS IN CANADA: THE YEAR IN REVIEW* 1980 (1981); Cairns, *The Politics of Constitution-Making: The Canadian Experience*, in *REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE* (K. Banting & R. Simeon eds.) (forthcoming Macmillan); Kerr, *Constitution Act, 1980: Is it Constitutional?*, 30 *U.N.B. L.J.* 73 (1981); Knopf, *Legal Theory and the "Patriation" Debate*, 7 *QUEENS L.J.* 41 (1981); McConnell, *Cutting the Gordian Knot: The Amending Process in Canada*, 44 *LAW & CONTEMP. PROBS.* 195 (1981); Schwartz, *General National Agreement: The Legal Sanction for Constitutional Reform in Canada*, 6 *QUEENS L.J.* 513a (1981); Slattery, *The Independence of Canada*, 5 *SUP. CT. L. REV.* 369 (1983); Strayer, *The Patriation and Legitimacy of the Canadian Constitution*, 45 *LAW & CONTEMP. PROBS.* 1 (1982).

⁹ Constitution Act, 1867.

¹⁰ *See Constitutional Amendment References*, [1981] 1 *S.C.R.* 753; 11 *Man. R.2d* 1, 34 *Nfld. & P.E.I.R.* 1, 95 *Atl. Prov.* 1; [1981] 6 *W.W.R.* 1, 125 *D.L.R.3d* 1, 39 *N.R.* 1, 209-10 (1981); [hereinafter cited as 39 *N.R.* 1].

¹¹ Factum of the Attorney General of Canada, *Constitutional Amendment References*, 39 *N.R.* 1 (1981), at app. III.

¹² R. ZUKOWSKY, *supra* note 8, at 29.

cial governments concurred.¹³ This decision—to seek “unilateral patriation”—brought to the surface a long unresolved difference as to which Canadian authorities should apply for constitutional amendments from Westminster. For at least fifty years the federal authorities had not sought an amendment derogating from the legislative powers of the provinces without first obtaining the consent of the government of each province affected.¹⁴ Now the federal government proposed to abandon that policy which, while uniformly followed in practice, had never been fully conceded in theory. The provincial response was fierce. Eight of the ten provincial governments joined to oppose the federal initiative.¹⁵

The ensuing national debate on the propriety of the different approaches to constitutional change was both extensive and intensive.¹⁶ It involved spokesmen for various groups and interests, parliamentary rhetoric and maneuvering, alliances and divisions among governments and parties, academic scrutiny and journalistic commentary and a critical judgment in the Supreme Court of Canada.¹⁷ The result was the Federal-Provincial Conference of November 1981 at which a compromise was struck to which only the government of Quebec objected. The Charter of Rights and Freedoms proposed by the federal government was weakened, but approved. The alternative amending formula proposed by the provinces was adopted with minor modifications. After further adjustments, to which all ten contracting governments agreed, the constitutional plan formally was put into place through the actions of the Canadian and United Kingdom Parliaments and the proclamation of the Queen.¹⁸

This procedure put into place what amounts to a new constitutional regime in Canada. To better understand what was at stake in that process, the decisions being made will be re-examined and more abstract criteria for evaluating them will be suggested.

III. LEGALITY AND LEGITIMACY AT THE BASIS OF A CONSTITUTION

Legal, like pre-legal, social rules have no common identity or basis of existence in time save that of the group of human beings which accepts them. In times of crisis, the lawyer is obliged to admit that his judgments rest on a critical assessment of the identity of an object which normally

¹³ *Id.* at 58.

¹⁴ See G. FAVREAU, *THE AMENDMENT OF THE CONSTITUTION OF CANADA* 15-16 (1965). See *infra* notes 169-70 and accompanying text.

¹⁵ R. ZUKOWSKY, *supra* note 8, at 61-65.

¹⁶ The relevant events are chronicled in S. DUNN, *supra* note 1 and B. ZUKOWSKY, *supra* note 8, at 61-65. See also *infra* notes 188-217 and accompanying text.

¹⁷ *Constitutional Amendment References*, 39 N.R. 1 (1981). Two majority and two dissenting opinions were handed down. The Court held 7-2 that the federal initiative was permissible in strict law. These opinions will be referred to as (Law Majority) and (Law Dissent). The Court also held 6-3 that the initiative conflicted with a constitutional convention. These opinions will be referred to as (Convention Majority) and (Convention Dissent).

¹⁸ See *supra* notes 4-5 and accompanying text.

he regards as "artificial and anomalous" and legally barely intelligible—viz, the great "unincorporated society" in which he lives.

J.M. Finnis, 1973¹⁹

The most widely held interpretation of the political and legal events in Canada in 1980-82 is that they accomplished not the creation of a new Constitution, but merely the revision or completion of an existing one. The majority of justices of the Supreme Court of Canada described the enactment of a domestic amending procedure as "a finishing operation . . . fitting a piece into the constitutional edifice."²⁰ In one sense, this is certainly accurate. The principal institutions of government remained untouched, and the distribution of powers between provincial and federal governments was largely unchanged.

Given the establishment of a new amending procedure, the constitutional reforms of 1980-82 are properly understood as involving much more. All law in Canada depends for its binding force on the authority of the constitution. Prior to 1982, the legal justification for every instance of law-making and law-application was ultimately derived from the powers granted in the British North America Acts, and no instance of law-making or law-application was valid which occurred in a manner not so authorized. Moreover, no legal power existed in Canada to alter that allocation of permitted and forbidden actions.²¹ It could be altered only by a statute of the United Kingdom, and the preconditions to requesting such a statute were undefined in law. With the advent of the amending formulas of the Constitution Act, 1982, this situation changed. Those formulas specify certain collections of Canadian organs of government (federal and provincial legislative bodies and executive organs) which alone may alter the conditions for valid law-making and law-application in Canada. These constitutional amendment authorities are now, therefore, the masters of the Canadian legal system to a degree which no Canadian agency could attain before the Constitution Act came into force. The federal-provincial distribution of powers, the ownership of resources, the personal and property rights of individuals, the shape and composition of Parliament, the existence of the provinces, the continuation of democratic government itself all lie—as matters of law—in the hands of the persons and institution comprising the appropriate amending powers.²²

¹⁹ Finnis, *Revolutions and Continuity of Law*, in OXFORD ESSAYS IN JURISPRUDENCE 44, 70 (2d ser. 1973).

²⁰ *Constitutional Amendment References*, 39 N.R. at 48 (Majority Law). See Cairns, *Politics of Constitutional Conservatism*, in AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT 28, 29 (K. Banting & R. Simeon eds. 1983) ("Our constitutional system was only modified, not overthrown by our recent constitutional renewal").

²¹ Under §§ 91 and 92 the provincial legislatures and, in certain respects the federal Parliament were empowered to amend their own constitutions. But this restricted amending power was, itself, entrenched beyond Canadian legal reach.

²² The Constitution Act, 1982 is exhaustive in enumerating those parts of the Canadian

The major question facing Canada in 1980-82 was, therefore, the proper way to determine the ultimate governing rules of the legal system. Such a decision was obviously a matter of profound importance for, in a constitutional regime, political decisions are made by entities created and controlled by law. Thus, the question was also one of the appropriate definition of the ultimate political power.

By what standards should the alternative outcomes in such a decision be judged? They cannot be evaluated by any measure of positive law—of legality. This is true even though the subject is the character of the legal system. Indeed, it is just because the question is one of defining the ultimate power to modify, destroy and create anew the rules of law that those rules, themselves, cannot provide a solution.²³ Rather the issue is, in the most fundamental sense, one of political choice.

Every legal system sits upon a political bottom. A familiar illustration in the literature of constitutional theory traces, by a process of regression, the sources of validity for, say, a city ordinance. The ordinance is valid because enacted in the manner provided in the City Charter. The Charter is valid because promulgated in accordance with the terms of a legislative enabling act. The enabling act is valid because enacted by the legislature in a way authorized by the Constitution. At this point, ordinarily, the chain of legality must stop. The Constitution is binding law, but not because it was created under the authority of some higher instance of positive law.²⁴ The source of the legal quality of the Constitution—and therefore, the source of the legal quality of all valid law—must be found in some phenomenon other than law.

Many have attempted to characterize that phenomenon. Hans Kelsen wrote of a "basic norm," the validity of which is presupposed.²⁵ H.W.R. Wade described it as a matter of political fact.²⁶ H.L.A. Hart gave the

Constitution which may be amended by the various techniques provided. See *supra* note 3. There are no unamendable provisions. Compare U.S. CONST. art. V. Of course, an argument may be made that the very term "amendment" involves some limitations on the degree of change allowed. See *Kesavanada v. State of Kerala*, 1973 A.I.R. 1461 (India); Child, *Revolutionary Amendments to the Constitution*, 10 CONST. REV. 27 (1926); Scott, *Constituent Authority and the Canadian Provinces*, 12 MCGILL L.J. 529, 537 (1966-67).

The discussion in the text is not intended to imply that no such supreme legal authority existed before 1982. Quite clearly that power was in the United Kingdom Parliament. In fact, the shift from that formal legal power, with the probabilities and uncertainties associated with its use, to a new, explicitly defined, Canadian power, with different probabilities and uncertainties associated with its use, illustrates the critical nature of the decision being made. See Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective*, 45 LAW & CONTEMP. PROBS. 283-84 (1982).

²³ Cf. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 91-93 (1962) (noting the limited nature of debates accompanying both political and scientific revolutions).

²⁴ P. FITZGERALD, *SALMOND ON JURISPRUDENCE* 111-12 (1966); H. HART, *THE CONCEPT OF LAW* 103-04 (1961); K. OLIVECRONA, *LAW AS FACT* 96 (1971); Wade, *The Basis of Legal Sovereignty*, 13 CAMB. L.J. 172, 196 (1955).

²⁵ H. Kelsen, *THE PURE THEORY OF LAW* 46-48, 194-200 (1967).

²⁶ Wade, *supra* note 24, at 188; see also P. FITZGERALD, *supra* note 24, at 58-59, 84-87,

matter its most illuminating explanation in postulating a legal system's rule of recognition (and it is on Hart's model that the following discussion will be based). The rule of recognition provides the ultimate criteria for identifying valid law but is not itself validated by prior positive law.²⁷ Since this rule of recognition accounts for the binding legal force even of the Constitution, it is plausible to refer to it as the "preconstitutional" rule.²⁸ In England, we might say that the preconstitutional rule is: "What the Queen in Parliament enacts is law." In the United States we might say, with respect to federal law, the preconstitutional rule is: "The Constitution, and what the institutions of the federal government enact, within the limits and according to the procedures of the Constitution, are law."²⁹

What creates a preconstitutional rule and the criteria by which it may be criticized cannot, for the reasons suggested, be questions of law.³⁰ For Hart, the rule of recognition exists in a particular legal system only by virtue of its acceptance as such. While the rule of recognition must be regarded as law by participants acting within the system (from the "internal" point of view),³¹ its status as the ultimate rule necessarily depends on circumstances which can only be understood from a point of view external to the legal system. That is to say, the establishment and identification of the preconstitutional rule must be matters of fact.³²

111-12.

²⁷ H. HART, *supra* note 24, at 103-05.

²⁸ See Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

²⁹ The examples cited are, of course, highly simplified. In the United States the failure of the judiciary, whose determinations are accepted as binding statements of law, simply to follow the prescriptions and proscriptions of the written constitution indicate that the text may provide merely one component of a more complex preconstitutional rule. See Kay, *supra* note 28. In any highly developed legal system the preconstitutional rule will be a complex, compound set of criteria. See H. HART, *supra* note 24, at 92-93; cf. Finnis, *supra* note 19, at 68-69.

³⁰ Nonetheless some commentators have referred to the underlying criteria for validity of laws as themselves rules of the common law. See W. JENNINGS, *THE LAW AND THE CONSTITUTION* 156-63 (5th ed. 1959); Dixon, *The Common Law as an Ultimate Constitutional Foundation*, 31 AUSTRL. L.J. 240 (1957); Slattery, *The Independence of Canada*, 5 SUP. CT. L. REV. 379-81 (1983). While this characterization is attractive in that it conforms with the fact that these criteria commonly show up in judicial decisions, see H. WADE, *CONSTITUTIONAL FUNDAMENTALS* 25-40 (1980), it is anomalous in that the common law itself is ordinarily understood to be subordinate to and alterable by statutory law. That understanding is just one manifestation of the generally accepted view that the common law is a product of an established legal system. As such it cannot comfortably contain the defining standards of that system. See Wade, *supra* note 24, at 186-87; cf. P. FITZGERALD, *supra* note 24, at 58-59, 84-87.

³¹ H. HART, *supra* note 24, at 107-08.

³² See *id.* at 106-07; Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 168-69 (1982); Slattery *supra* note 30, at 379-81; Wade, *supra* note 24, at 188. Hart's position is to be distinguished from Kelsen's theory of the Basic Norm. For Kelsen the validity of the ultimate norms of positive law is supplied by a "Basic Norm," the validity of which is not demonstrated, but presupposed. See H. Kelsen, *supra*

These "facts" are the attitudes of the human beings who comprise the society in which the legal system is effective. In particular, Hart insists that the officials (more prominently the judges) of the system recognize the binding quality of rules which meet the criteria of the preconstitutional rule. These officials must share a critical reflective attitude toward the rule so that behavior inconsistent with it provides an occasion for criticism. For Hart, it is not necessary that the population in general possess such an attitude. It is enough if law, which is valid under the preconstitutional rule is generally obeyed.³³

Inquiries into the *validity* of a rule of law are comprehensible only within a given legal system with a given preconstitutional rule. Such inquiries will here be termed questions of "legality." Inquiries into the *desirability* of a particular preconstitutional rule must have reference to attitudes existing in society. Such inquiries will here be termed questions of "legitimacy."

The term "legitimacy" is used here in a rather special sense. In particular it denotes the acceptability of a preconstitutional rule in terms of its suitability to attitudes and beliefs held in the particular society in which the legal system is to be effective.³⁴ This is in keeping with Hart's

note 25, at 194-202. The critical difference, for our purposes, is that the Basic Norm is not grounded in the factual circumstances and behavior of the participants of the legal system. See *id.* at 208. Compare H. HART, *supra* note 24, at 105-06. Kelsen's position is a consequence of his insistence on the impossibility of deriving a norm from a fact, an "ought" from an "is." See H. Kelsen, *supra* note 25, at 193; N. McCORMICK, H.L.A. HART 25-26 (1981); J. RAZ, *THE AUTHORITY OF LAW* 125-26 (1979). Kelsen's Basic Norm, therefore, is, as he states, not a tool of ethical-political analysis. It is rather a logical consequence of the existence of a legal system. See H. Kelsen, *supra* note 25, at 218; Kelsen, *Professor Stone and The Pure Theory of Law*, 17 STAN. L. REV. 1128, 1142-43 (1965). The discussion in the text, which focuses on the ethical-political factors which form the defining characteristics of a legal system, relies, therefore, on the kind of analysis best explicated by Hart.

³³ See H. HART, *supra* note 24, at 111-14. Particular emphasis has been placed upon the acceptance of judicial officials and, indeed, it is in their pronouncements that the nature of a preconstitutional rule will often be most easily discovered. Indeed, Professor Wade has gone so far as to suggest that the preconstitutional rule can be conveniently changed by manipulating the judicial oath. See H. WADE, *supra* note 30, at 37-39; cf. P. HOGG, *CONSTITUTIONAL LAW OF CANADA* 25 (1977). It seems unlikely, however, that such judicial acquiescence would issue out of a political environment which was not already hospitable to a new rule.

³⁴ While this terminology of "legality" and "legitimacy" appears to be the most convenient and useful available, it does not conform to all common uses of these words. Therefore it is necessary to emphasize the special senses in which they are used. For example, the term "legality" is sometimes employed to refer to qualities other than that emphasized here, i.e., conformity to positive law. It has been used to indicate those attributes of certainty, stability and generality associated with the phrase "the rule of law." See L. FULLER, *THE MORALITY OF THE LAW* 33-94 (1964); A. MATHEWS, *LAW ORDER AND LIBERTY IN SOUTH AFRICA* 3-17 (1972); Remillard, *Legality, Legitimacy and the Supreme Court*, in *AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT 189* (K. Banting & R. Simeon eds. 1983).

The term legitimacy is frequently used in ways both broader and narrower than that intended here. See Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 Wis.

notion that the preconstitutional rule is determined by the attitudes and beliefs of the participants in the legal system. Claims of the legitimacy of a preconstitutional rule are, therefore, claims of "fit" between the preconstitutional rule and the characteristics of the society involved.³⁵

L. REV. 379, 381 n.1. First, it is common to characterize an action as legitimate if it conforms to established positive law. See H. Kelsen, *supra* note 25, at 209. This usage, of course, makes legitimacy synonymous with legality and, thus, dissolves the distinction which is being advanced. See C. Friedrich, *MAN AND HIS GOVERNMENT: AN EMPIRICAL THEORY OF POLITICS* 234 (1963); Strayer, *The Patriation and Legitimacy of the Canadian Constitution* 3-2 (Cronkite Memorial Lectures, University of Saskatchewan College of Law, Oct. 1982) (distinguishing "legal legitimacy" from "political legitimacy"). Debate on the Canadian Constitution was particularly susceptible to this conflation because the formal legal system still reflected a preconstitutional rule which recognized enactments of the United Kingdom Parliament as law. A focus on that formal system, therefore, made possible a contention that nothing was involved beyond a mere question of law. The most prominent evidence of the mixture of legal and political elements was the *Constitutional Amendment References*, 39 N.R. at 1, and in particular, its responses to the questions concerning constitutional conventions. The idea that such fundamental differences about the way to define a legal system could be resolved by a court of law, presumably by reference to the very legal system whose definition was at issue, is, at best, a strange one. But see Colvin, *Constitutional Jurisprudence in the Supreme Court of Canada*, 4 SUP. CT. L. REV. 3 (1982). Indeed, for the reasons suggested in the text, the Supreme Court's judgments, while of critical political significance, ought not to be viewed as actual statements of law. See Kay, *Courts as Constitution-Makers in Canada and the United States*, 4 SUP. CT. L. REV. 23 (1982). This distinction between legality and legitimacy depends upon a positivist understanding of the nature of law. That view will not be defended. Those with a different conception will find the difference between the two kinds of arguments less convincing. See W. Lederman, *CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS* 85, 435 (1981); Knopff, *supra* note 8, at 41.

The second common use of the term "legitimacy," which will be avoided here, refers to the claimed conformity of an exercise of power to some standard of general morality, not necessarily associated with the beliefs or behavior of any particular group of human beings. Someone using this meaning of the term would condemn, as illegitimate, any law or system of law which violated some minimally acceptable principles of justice. See *United States v. Moore*, 486 F.2d 1139, 1240-41 (D.C. Cir. 1973) (Wright, J., dissenting); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 424 (1958); see also Stillman, *The Concept of Legitimacy*, 7 POLITY 32, 36-37 (1974). In contrast, legitimacy as used here will be assumed to be society-specific.

³⁵ This use of the term is similar to that employed by Weber as describing a phenomenon which is contingent on the facts of an actual society. See M. Weber, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 124-32 (T. Parsons ed. 1964); see also S. Lipset, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 76-83 (1960); C. Friedrich, *supra* note 34, at 233-34; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 807-08 (1983); Stillman, *supra* note 34; cf. J. Habermas, *LEGITIMATION CRISIS* 95-117 (McCarthy trans. 1975) (a critical argument for a "truth-dependent" test of legitimacy but one still "grounded in the consensus of the participants through argumentation." *Id.* at 105); Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 30-31 (1978) (relevance of both fit and goodness to adjudication of difficult cases); Dworkin, *Natural Law Revisited*, 34 U. FLA. L. REV. 165 (1982) (same as previous reference); Remillard, *supra* note 34, at 194 (not contingent on any independent moral and political criteria).

Hart's concern with the social attitudes of participants in the legal system is in connection with the factual investigation which is necessary to identify the preconstitutional rule. To some extent that inquiry may be conducted by an examination of the express rules of

Although this restricted concept of legitimacy is, concededly, somewhat artificial, it does seem to capture the quality of the arguments in Canada in 1980-82. If one separates out the legally-framed aspects of the debate,³⁶ it mainly centered on the consistency or inconsistency of the various positions with Canadian tradition and values.³⁷ This kind of contextual legitimacy, of course, is an enormously complex matter. For example, Hart emphasized the critical reflective attitude of the officials administering the law, in contrast to attitudes in the general population. But "official" and "popular" attitudes are not independent phenomena. Each influences, and is influenced by the other, and both must be examined in debating the legitimacy of a suggested constitutional principle. Furthermore, the very legal system which is at issue may mold, as well as be molded by the underlying social factors.³⁸ Finally, those attitudes and beliefs also will be the product of numerous, diverse and sometimes contradictory factors—historical, economic, religious, geographical and so forth. This amalgam of influences provides the political underpinning on which any legal system must finally rest.

Obviously, this essay will not (and could not) contain the kind of social investigation which is implicit in a consideration of the suitability of one or another preconstitutional rule for the Canadian legal system. In particular, there will be no attempt here to identify some set of constitutional arrangements as actually achieving or failing to achieve the status of legitimacy. Rather, the concept of legitimacy will be employed to characterize a kind of argument that is utilized in periods of constitutional change. So long as a legal system is in place, administered by the courts and other officials, and is generally effective, its legitimacy ordinarily will be assumed. As soon, however, as the basis of the system (not just the validity of a particular rule) is brought into question, issues of legitimacy

the legal system and the statements of its officials. But often such information will be insufficient either because of a divergence between these artifacts and the actual operation of the legal system or because verbal formulations are inherently inexact. See H. HART, *supra* note 24, at 144-50. In such cases we will need to know more about the way society works outside the formal machinery of the legal system.

In periods of contested constitutional change, however, the task will not be descriptive but critical, asking whether an existing or alternative preconstitutional rule is a good or bad one. See Kay, *supra* note 28, at 193. Here the fit of a preconstitutional rule with the social background will be an argument in its favor and the absence of fit will, in this terminology, be condemned as evidence of illegitimacy.

³⁶ See *infra* notes 130-38 and accompanying text.

³⁷ See, e.g., 124 PARL. DEB., H.C. 8512 (1981) (Can.) (statement of Prime Minister Trudeau on Mar. 23, 1981) ("Let me ask, first of all, if this resolution is compatible with our traditional political values . . .") [hereinafter cited as Statement of the Prime Minister]; 124 PARL. DEB., H.C. 3302 (1980) (Can.) (statement of Mr. Epp, Opposition Constitutional Critic on Oct. 6, 1980, comparing proposed patriation to 1867 founders who "accepted such [a federal] arrangement because it was in accord with the political and social reality of the nation, and I suggest to all members of the House that that reality still exists today").

³⁸ See *infra* notes 219-51.

necessarily arise. This kind of argument may be of little moment so long as such doubts are isolated. Occasions may arise when it is fair to say that a whole society is engaged in critical discussion of the basis of its law. In those cases the justifications and denunciations will appeal to standards of legitimacy.

Although casting the debate of 1980-82 in terms of legitimacy cannot produce definitive answers to the questions that were raised, recognition that the debate was about matters of legitimacy can help clarify the nature of the argument. It is valuable to demonstrate the limited part which strictly legal arguments could have in resolving the controversy. Furthermore, it is possible to refer to at least some well-understood values and traditions, which are widely agreed to be present in Canadian society and to draw some conclusions about their consonance with some hypothetical preconstitutional rules. Finally, we might conclude that, in a general way, certain procedures and ingredients in the constitutional process are more plausibly argued to assure the kind of fit with the social and political facts which is necessary for the legitimacy of the resulting constitutional rules.

Any discussion of the legitimacy of a preconstitutional rule must involve an examination of two aspects—its contents and its origins. Each must be compatible with the values and beliefs of the society whose rules of law it governs. Thus, with regard to content, a society with a uniform and strongly rooted tradition of belief in a revealed religion may require a preconstitutional rule in which the standard of valid law involves reference to an accepted medium of revelation. But even the specification of acceptable criteria of validity might be insufficient if the rule issues from what is perceived as a corrupt origin. Thus, a constitutional system which provides substantively adequate rules of legal validity might be incapable of achieving the respect needed to define the limits of the legal system, if its historical source was the edict of a foreign conqueror. Consequently, questions concerning the character of an existing preconstitutional rule, as well as the probability or propriety of a change in it, necessarily demand reference to the social organizations, the customs and practices, the history and the moral and political principles of that group of human beings who are to live under the system of law which that rule is to define.³⁹

It is now possible to restate the kinds of questions which were at

³⁹ See H. HART, *supra* note 24, at 106-07; J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 211 (2d ed. 1980); Finnis, *supra* note 19, at 69-70; Commentary, *Symposium: Constitutional Adjudication and Democracy*, 56 N.Y.U. L. REV. 525, 537 (1981); Stillman, *supra* note 34.

The meaning given legitimacy, is, it will be noted, something of a catch-all incorporating all of the inexact non-legal factors which will be relied on in deciding the propriety of a possible basis of the legal system. It, therefore does not respond to Professor Hyde's opposition between legitimacy on the one hand and other reasons for adhering to a legal system such as "habit, fear of sanctions and individual conviction that the requested compliance is in the actor's interest." Hyde, *supra* note 34, at 388.

issue in the patriation debate of 1980-82. The proposed substantive constitutional rules would govern the validity of all Canadian law, but those constitutional rules were valid only insofar as they were created or left in place by the amending formulas to be established. The specification of a Canadian amending formula to replace the uncertain, informal and extra-legal collaboration with the United Kingdom Parliament involved, therefore, a change in the preconstitutional rule.

Such change cannot be mere legal change.⁴⁰ No one doubted that enactment at Westminster provided the appropriate formal legal mechanism for constitutional change.⁴¹ However, no one suggested that it alone provided an answer to the substantive questions at issue in 1980-82. That is, no one claimed that the new amending powers would or should acquire their status as the governing rules of the legal system solely by virtue of their enactment by the United Kingdom Parliament. The debate focused instead upon the process which should take place in Canada. The arguments lacked the critical characteristic of positive legal discourse.⁴² They were not addressed to the contention that one or another patriation process conformed or failed to conform to what was agreed to be the correct standard for constitutional change. It was, rather, the nature of that standard which was at issue. Consequently, the new constitutional amending provisions which precisely define the final constitutional power are, (putting aside the entirely formal imprimatur of the United Kingdom Parliament) based on an authority no stronger or weaker than the force of the processes employed and the arguments made in Canada in 1980-82, none of which acquired their potency from law.

In light of these considerations it is fair to characterize the 1980-82 constitutional change, at least in a narrow sense, as revolutionary in a way which even major alterations authorized by law cannot be. Of course this kind of revolution need involve no tumult or bloodshed. It may even leave undisturbed the day to day rules and practices of political and legal

⁴⁰ But see W. LEDERMAN, *supra* note 34, at 438-39; Colvin, *supra* note 34.

⁴¹ But see *infra* notes 139-46 and accompanying text.

⁴² The attempt to find positive law restrictions on the capacity of any Canadian agency or person to initiate the process at Westminster was rejected by the Supreme Court in the "legal" aspect of the *Constitutional Amendment References*, 39 N.R. at 1. The strictly legal restraints, which remained were, therefore, entirely formal. It is now possible to point to the Court's judgment on the "convention" question as specifying a pre-existing preconstitutional rule which confided plenary constitutional authority to the Parliament of Canada acting with "substantial" provincial assent. But, unlike questions of positive law, no court can be authoritative as to the defining characteristics of the legal system of which it is a part. See Kay, *supra* note 34. If the Court's standard were the accepted preconstitutional rule, it is surprising that so few people based their claims on it in the constitutional debate. Only one of the governments submitting arguments to the Supreme Court pressed this possibility. See Factum of the Attorney-General of Saskatchewan, *Constitutional Amendment References*, 39 N.R. at 33-41; see also Schwartz, *supra* note 8, at 513a. After the decision, of course, the Court's position became an important factor in the political process leading to the agreement of Nov. 1981. See *infra* notes 197-201 and accompanying text.

institutions. But it works changes which are literally fundamental in creating the foundations of law while resting, itself, on no law.⁴³ The process which led to the enactment of the Canadian Constitution Act 1982 sought to accomplish such a change. It created new and explicit rules for the exercise of ultimate legal power in Canada.⁴⁴

The decisions on constitutional change in Canada, necessarily depended not on the legality, but on the legitimacy of the competing positions. Each specified, in effect, a "candidate" for the preconstitutional rule of the Canadian legal system. Given the reasoning above, any evaluation of the different arguments must focus on both the contents and origins of hypothetical preconstitutional rules. That is, attention is required both to the substance of the amending mechanisms suggested, and the process by which those mechanisms would be established.⁴⁵ The arguments would turn on the suitability of both the substance and the process of each alternative in the context of Canada's social and political facts in the 1980's. It is such suitability that provides a basis for arguing that a fundamental constitutional rule is legitimate. And it is only this legitimacy—not any notion of pre-existing legality—against which fundamental constitutional change may be measured.

An examination of the events leading to the establishment of the Constitution of the United States in 1787-89 reveals the difference between arguments of legality and legitimacy in constitutional change with unusual lucidity. In the Canadian constitutional debate, however, these two forms of evaluation were less precisely distinguished. The American experience will be considered first.⁴⁶

⁴³ "Fundamental" derives from the Latin verb, *fundare*, "to lay the bottom," and refers to "a principle, rule, law or article which serves as the groundwork of a system." MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY 1019 (2d ed. 1934). It is in this, *ne plus infra* sense, not merely in its importance, that the preconstitutional rule is fundamental.

⁴⁴ It may be that this kind of change necessarily takes place whenever the constitutional amendment power is altered, even when accomplished in accordance with the prior amending procedure. This is the problem investigated by Alf Ross in Ross, *On Self-Reference and a Puzzle in Constitutional Law*, 78 MIND 1 (1969). But cf. Hart, *Self-Referring Laws*, in FESTSKRIFT TILLAGNAD KARL OLIVECRONA 307 (1964). See W. LEDERMAN, *supra* note 34, at 438-39; Colvin, *supra* note 34.

⁴⁵ That is, one might find an actual amending procedure acceptable on its face but still object to it because it derived from a source of authority thought inappropriate. See Stillman, *supra* note 34, at 41. This appeared to be the position of Professor Lederman who found some variant of the "Victoria" amending formula proper but was unwilling to approve its imposition by the federal government without some measure of provincial consent. See W. LEDERMAN, *supra* note 34, at 85-86.

⁴⁶ Comparative treatment always involves the risk of over-emphasizing either similarities or differences. That risk is exacerbated when the subjects are separated by time as well as geography. This should be borne in mind in what follows. It will be contended that, at root, the two processes dealt with a similar question. To support that claim the parallels will be heightened better to focus on the way it was resolved in each case. Of course, with respect to other kinds of investigations those likenesses will be of considerably less importance.

IV. THE CREATION OF THE UNITED STATES CONSTITUTION: 1787-89

There are great seasons when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it.

Edmund Randolph, 1787⁴⁷

A. *The Articles of Confederation*

The first legal frame of government for the union of the thirteen southern colonies of North America was submitted by the Continental Congress to the various state legislatures on November 15, 1777.⁴⁸ Sixteen months earlier Congress had declared those colonies to be "free and independent states" having full power to do the "things which independent states may of right do."⁴⁹ The Articles were to have no effect until accepted by every state legislature. Largely due to differences over various state claims to western lands, the last state did not approve the Articles until March 1781.⁵⁰ This ratification brought into being for the first time the legal entity known as "The United States of America." The Articles defined the legal nature of that entity for eight years until the institution of the new constitutional government in 1789.⁵¹

The nature of that first constitution was clear from the face of the document itself. The Articles established a "perpetual" union of the states and granted some significant, but limited, national powers to a Congress of state delegates in which each state had a single vote and in which no important action could be taken without the assent of nine states. The Articles declared that "each state retains its sovereignty, freedom and independence and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States in Congress assembled."⁵² Any change in the Articles themselves required the unanimous agreement of the state legislatures.⁵³ The Articles, therefore, while establishing a substantial federation for its time,⁵⁴ did not create a national government, in any modern sense, but "a firm league of friendship."⁵⁵

The difficulties and shortcomings of the Confederation government

⁴⁷ 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 262 (1966).

⁴⁸ R. MORRIS, ENCYCLOPEDIA OF AMERICAN HISTORY 98 (1961).

⁴⁹ Declaration of Independence, para. 32 (U.S. 1776).

⁵⁰ B. BAILYN, D. DAVIS, ET AL., THE GREAT REPUBLIC 304 (1977) [hereinafter cited as B. BAILYN & D. DAVIS].

⁵¹ M. JENSEN, THE ARTICLES OF CONFEDERATION 239 (1940).

⁵² ARTICLES OF CONFEDERATION art. II (U.S. 1781).

⁵³ *Id.* at art. XIII.

⁵⁴ Note, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142 (1978).

⁵⁵ ARTICLES OF CONFEDERATION art. III. See B. BAILYN & D. DAVIS, *supra* note 50, at 302-03.

have been recounted many times.⁵⁶ Although it oversaw important accomplishments in the successful conclusion of the Revolutionary War and the organization of the Northwest Territories, it was, in a literal sense, constitutionally incapable of dealing adequately with the persistent problems facing the country. Any successful economic policy was precluded by the failure to give the Congress authority to tax, to regulate commerce or to control credit, and by an inability to deal with the delinquency of many states in their financial contributions. With respect to international relations, the central government was incompetent to establish national tariff or trade policies and this resulted in a serious disadvantage in competing or negotiating with other countries. In all of these matters, the division and conflict of political authority was a major obstacle to progress. Moreover, the state governments, to which most important public decision-making had been confided, were increasingly prone to inefficiency and corruption and, consequently, to diminished public respect.⁵⁷ In the last years of the 1780's, it was widely perceived that any solution to these difficulties would involve a significant augmentation of national power.⁵⁸

In January 1786, the Virginia legislature proposed to her sister states that a convention be held in Annapolis in September to consider solutions to the commercial problems plaguing the confederation.⁵⁹ Only five states sent delegates. They merely proposed to Congress that it call another convention to be held in Philadelphia the following spring to consider not just commercial matters, but "to devise such further provisions as shall appear to [the delegates] necessary to render the constitution of the federal government adequate to the exigencies of the union."⁶⁰ Partially in response to the argument that such a convention was contrary to the lawful procedure for constitutional amendment provided in the Articles, Congress, for a time, ignored the request. By February 1787, however, a majority of the states had elected delegates to the convention. Congress then issued a call for a convention for "the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the federal constitution adequate to the exigencies of government and the preservation of the union."⁶¹

The main features of the deliberations and agreements which took place in that extraordinary convention in Philadelphia in the summer of 1787 are now well known to every student of American history. The dele-

⁵⁶ See, e.g., B. BAILYN & D. DAVIS, *supra* note 50, at 325-29, and sources cited *id.* at 350. But see Note, *supra* note 54.

⁵⁷ See B. BAILYN & D. DAVIS, *supra* note 50, at 325-28.

⁵⁸ *Id.* at 329.

⁵⁹ M. JENSEN, *THE MAKING OF THE AMERICAN CONSTITUTION* 33 (1964).

⁶⁰ *THE FEDERALIST* No. 40, at 264 (Bourne ed. 1901); C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 61-63 (1913, MacMillan Press ed. 1936).

⁶¹ 3 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 13-14 (1966).

gates proposed an entirely new government and, at their suggestion, the plan was not submitted to the state legislatures but was ratified by specially elected conventions in each state.⁶² When the ninth state, New Hampshire, ratified in June 1788, the Constitution by its own terms, could come into effect. Shortly thereafter, when Virginia and New York followed suit, the inauguration of the new regime was assured.⁶³ In the spring of 1789, the new government was organized and the Constitution became the supreme law of the land.⁶⁴

B. The Legality of the Constituent Process

1. The Convention of 1787

The transition from the Articles of Confederation to the Constitution was the institution of a new legal system premised on significantly different political principles. Since the final authority of the state legislatures which underlay the Articles was scrapped, this change was more than a mere legal revision under a continuing preconstitutional rule. The extra-legal character of the change was understood even prior to the convention and helps explain Congress' reluctance officially to initiate such an unorthodox technique of constitutional change.⁶⁵

The same recognition surfaced early in the deliberations of the convention itself. On May 29, Edmund Randolph of Virginia put before the convention three resolutions proposing a wholesale replacement of the Confederation by a strong national government.⁶⁶ The suggestion that the convention even consider such a radical change raised a serious question which the plan's opponents were quick to point out. The Congressional resolution calling the convention, as well as the instructions to a number of state delegations, restricted the convention's mission to "revising the Articles of Confederation and reporting . . . alterations and provisions therein."⁶⁷ Randolph's "Virginia Plan" proposed replacement, not revision. To approve the resolution, therefore, Charles Pinckney of South Carolina argued, would mean "their business was at an end."⁶⁸ William Paterson of New Jersey warned the delegates that they "ought to keep within [the Articles'] limits, or [they] should be charged by [their] constituents with usurpation. . . . [T]he people of America were sharp-sighted and not to be deceived."⁶⁹ The objection was put sharply in an anti-constitutional tract published during the ratification debate:

⁶² M. JENSEN, *supra* note 59, at 102-05.

⁶³ *Id.* at 138-39.

⁶⁴ R. MORRIS, *supra* note 48, at 121.

⁶⁵ See *infra* notes 108-17 and accompanying text.

⁶⁶ See M. JENSEN, *supra* note 59, at 39-42.

⁶⁷ 3 M. FARRAND, *supra* note 61, at 13-14.

⁶⁸ 1 M. FARRAND, *supra* note 47, at 39.

⁶⁹ *Id.* at 178; Remarks by E. Gerry, *id.* at 42-43; Remarks by J. Lansing, *id.* at 249; M. JENSEN, *supra* note 59, at 42-43, 52-57.

They [the Convention] had no other authority to act in this matter than what was derived from their *commissions*—when they ceased to act *in conformity thereto* they ceased to be a federal convention, and had no more *right* to propose to the United States the new form of government than an equal number of other gentlemen, who might voluntarily have assembled for this purpose—the members of the convention, therefore, having the merit of a work of superogation, have thereby inferred no kind of obligation on the States to *consider*, much less to adopt *this plan of consolidation*. The consolidation of the union! What a question is this, to be *taken up* and *decided* by thirty-nine *gentlemen* who had no public authority whatever *for discussing it!*⁷⁰

In reply, the advocates of the new constitution made a half-hearted legal argument. Madison asserted that the new government was not so different from the Confederation government and was a mere “alteration.”⁷¹ “The truth is,” he later wrote, “that the great principles of the Constitution proposed by the convention may be considered as less absolutely new than as the expansion of principles which are found in the Articles of Confederation.”⁷² The critical legal question, however, was not whether the Constitution was “absolutely new” but whether it could reasonably be construed as a “revision” of the prior instrument. That it was more than this is a matter of little doubt. The supporters of the Constitution also sought comfort in the language of the Congressional authorization, which had called on the convention to propose such alterations as would “render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union.”⁷³ That being the convention’s charge, Randolph argued, “it would be treason to our trust, not to propose what we found necessary.”⁷⁴ Given the deficiencies in the existing government, a delegate to the North Carolina ratifying convention explained, “[i]t was found impossible to improve the old system without changing its very form.”⁷⁵ However, in light of the strict and specific language of the Congressional call, this liberal interpretation was highly implausible. It is hard to dispute the common sense of John Lansing’s observation that “N[ew] York would never have concurred in sending deputies . . . if she had supposed the deliberations were to turn on a consolidation of the States, and a National Government.”⁷⁶

⁷⁰ *Letters of “A Republican Federalist,”* in *THE ANTI-FEDERALIST* 114 (C. Kenyon ed. 1966).

⁷¹ 1 M. FARRAND, *supra* note 47, at 314.

⁷² *THE FEDERALIST* No. 40, *supra* note 60, at 268. For a modern argument that there was significant continuity between the Articles government and the new Federal government, see Note, *supra* note 54, at 160-65.

⁷³ 1 M. FARRAND, *supra* note 47, at 14.

⁷⁴ *Id.* at 255.

⁷⁵ 3 M. FARRAND, *supra* note 61, at 351 (remarks of R.D. Spaight in North Carolina Convention, July 30, 1788); see *THE FEDERALIST* No. 40, *supra* note 60, at 248-49 (Madison); M. DIAMOND, *THE FOUNDING OF THE DEMOCRATIC REPUBLIC* 23 (1981).

⁷⁶ 1 M. FARRAND, *supra* note 47, at 249.

If the legal argument on behalf of the convention's actions was unconvincing, other non-legal justifications would have to be devised. Some supporters of the convention's proposal minimized the importance of any departure from the legally established procedure on the grounds that the resulting recommendations had no juridical significance. Hamilton felt no difficulty because "[w]e can only propose and recommend—the power of ratifying . . . is still in the states."⁷⁷ The convention, Madison wrote, was "merely advisory and recommendatory," and its proposal was "of no more consequence than the paper on which it is written."⁷⁸ This was, of course, a concession and not a response to the claim of *ultra vires*.

Other defenders met the accusation more boldly. The convention's trespass of its legal boundaries was justified by the gravity of the situation facing the country and the incapacity of existing institutions to meet it. Colonel Mason insisted that in "certain crises . . . all the ordinary cautions yielded to public necessity."⁷⁹ He pointed to the 1783 Treaty with Great Britain during the negotiation of which the American envoys had exceeded their powers but in so doing had "raised to themselves a monument more durable than brass."⁸⁰ In *The Federalist* No. 40, Madison stated:

[The delegates] must have reflected, that in all great changes of established governments, forms ought to give way to substance; that a rigid adherence in such cases to the former, would render nominal and nugatory the transcendent and precious right of the people to "abolish or alter their governments as to them shall seem most likely to effect their safety and happiness," since it is impossible for the people spontaneously and universally to move in concert toward their object; and it is therefore essential that such changes be instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable citizen or number of citizens.⁸¹

"That is," concluded Charles Beard, commenting on this language, "the right of revolution is, at bottom, the justification for all great political changes."⁸²

2. The Ratification Process

The legal incapacity of the convention was only the beginning of the illegality which permeated the process which established the Constitution,

⁷⁷ *Id.* at 295; to the same effect, see *id.* at 253 (remarks of J. Wilson).

⁷⁸ *THE FEDERALIST* No. 40, *supra* note 60, at 252 (Madison).

⁷⁹ 1 M. FARRAND, *supra* note 47, at 338.

⁸⁰ *Id.*

⁸¹ *THE FEDERALIST* No. 40, *supra* note 60, at 252-53 (quoting the Declaration of Independence).

⁸² C. BEARD, *supra* note 60, at 223; see also *id.* at 223-25; Palmer, *The American Revolution: The People as a Constituent Power*, in *THE RE-INTERPRETATION OF THE AMERICAN REVOLUTION 1763-1789*, at 356-57 (J. Greene ed. 1968).

for the proposed Constitutional draft was, itself, inconsistent with the existing law of constitutional change. The states under the Articles retained such extensive powers of self-government that it is not inapt to describe the Articles government as an association of sovereign entities.⁸³ This is not to say, however, that the states had not submitted to limitations contained in the Articles themselves or that that commitment was revocable by any means not specified in the Articles. Article 13 made this clear:

Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which, by this confederation, are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.⁸⁴

The convention did not propose an "alteration" consistent with this Article. It did submit its product to Congress, but not for approval. Rather it was hoped that Congress would simply transmit the draft to the states. Moreover, under the terms of the proposed Article VII, state approval was to come not from the legislatures, but from conventions elected especially for that purpose in each state. Finally, even the state conventions would not have to approve unanimously. The agreement of nine states would be sufficient to make the Constitution effective "between the States so ratifying."⁸⁵ These departures from legality were fully recognized and understood by participants in the convention and ratifying debates.

One of the most hotly argued issues in Philadelphia involved what form the report of the convention to Congress ought to take. The ratification article reported to the convention by its committee on detail called for the Constitution to be submitted to the Congress "for their approbation."⁸⁶ Since each state cast a single vote in Congress and since unanimity would, doubtless, be required, the prospects for this form of ratification were practically non-existent. The convention modified the article so that it provided simply that the Constitution be laid before Congress, but not for approval or disapproval. Elbridge Gerry of Massachusetts warned that Congress would take "just umbrage" at being so casually removed from the constituent process.⁸⁷

The majority, however, did not prize legality among its most important objectives. Indeed the illegality of the process was a good reason for bypassing Congress. Thomas Fitzsimmons of Pennsylvania claimed this procedure would "save Congress from the necessity of an Act inconsistent

⁸³ See M. JENSEN, *supra* note 51, at 174-76.

⁸⁴ ARTICLES OF CONFEDERATION art. XIII (U.S. 1781).

⁸⁵ U.S. CONST. art. VII.

⁸⁶ 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 189 (1966).

⁸⁷ *Id.* at 560. Gerry found an ally in, of all people, Alexander Hamilton.

with the Articles of Confederation under which they held their authority."⁸⁸ In the end any embarrassing reference to the Congress—or indeed to any of the institutions or rules of the Confederation—was simply omitted. The convention approved a letter to be sent to Congress with the draft Constitution: "We have now the Honor to submit to the Consideration of the United States in Congress assembled that Constitution which has appeared to us the most advisable."⁸⁹ No mention was made of the power of the convention or the legality of the ratification procedure. In both respects the document spoke for itself.

Congress received the proposal three days after the convention adjourned:

[W]ith no unseemly expression of pleasure; indeed, as Bancroft says, it had been in reality invited "to light its own funeral pyre." No body can be expected to decree gladly its own demise; but there seems to have been no special desire on the part of the moribund Congress to prolong its own futile life.⁹⁰

Nevertheless, the opposition voiced in Congress was harsh. Richard Henry Lee, one of the Constitution's most effective opponents, denounced the Philadelphia delegates as "monarchy men . . . aristocrats and drones" and reminded the Congress that it was being asked to acquiesce in the "subversion of the constitution under which they acted."⁹¹ Lee's argument, however, was unsuccessful. To avoid the unseemliness of "decreeing its own demise," Congress transmitted the Constitution to the state legislatures without any recommendation.⁹²

The subsequent ratification procedure, calling for the approval of conventions in nine states, departed from the amending procedure of the Articles in two ways: by eliminating any substantive role for the legislatures and by dispensing with unanimity. Oliver Ellsworth noted this departure from legality in the convention and urged that the Constitution be treated as an amendment to the Articles to be approved by the state legislatures. Gouverneur Morris responded directly: Ellsworth's position "erroneously supposes that we are proceeding on the basis of the Confederation. This Convention is unknown to the Confederation."⁹³ Similarly, with regard to unanimity, Gerry "urged the indecency and pernicious tendency of dissolving in so slight a manner. If nine out of thirteen can dissolve the compact, six out of nine will be just as able to dissolve the new

⁸⁸ *Id.*

⁸⁹ *Id.* at 583.

⁹⁰ A. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 198 (1935).

⁹¹ M. JENSEN, *supra* note 59, at 121.

⁹² *Id.*

⁹³ 2 M. FARRAND, *supra* note 86, at 92. It was further argued that, since the new constitution might work some changes in state constitutions, the legislatures which existed under those constitutions ought not be asked to act inconsistently with them. *Id.* at 92-93 (remarks of J. Madison).

one hereafter."⁹⁴ Morris responded again. He agreed that as a matter of law less than unanimous consent of the *legislatures* under the Confederation would make any alterations null and void. But an appeal to the people outside the established legal system could alter the federal compact "in like manner as the Constitution of a particular State may be altered by a majority of the people of the State."⁹⁵ Furthermore, since the Constitution would only bind the states which did ratify, no state would be coerced into the new system.⁹⁶ These responses, of course, did not argue that the ratification was legal but that it was desirable, legal or not. In the Federalist No. 40, Madison readily conceded the legal necessity of unanimous agreement under the Articles but suggested that the requirement was so foolish as to "dismiss it without further observation."⁹⁷

In short, the entire constituent process was undertaken without legal sanction and, in significant part, in contradiction to law. In essence, it was an exercise in revolutionary change and no less so because accomplished by caucuses and conventions rather than by force of arms.⁹⁸ Charles Beard summarized this point:

If today the Congress of the United States should call a national convention to "revise" the Constitution, and such a convention should throw away the existing instrument of government entirely and submit a new frame of government to a popular referendum, disregarding altogether the process of amendment now provided, we should have something analagous to the great political transformation of 1787-89. The revolutionary nature of the work of the Philadelphia Convention is correctly characterized by Professor John W. Burgess when he states that had such acts been performed by Julius Caesar or Napoleon they would have been pronounced *coups d'état*.⁹⁹

C. *The Legitimacy of the Constituent Process*

The justifications for revolution, of course, cannot be justifications of law.¹⁰⁰ Rather, they must rely on considerations of justice, policy or ne-

⁹⁴ *Id.* at 561. The impropriety of dissolving the confederation by less than unanimous consent was also put forward vigorously in the ratification debates. See, e.g., *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, in *THE ANTI-FEDERALIST*, *supra* note 70, at 33 n.1, and the remarks of William Lancaster in the North Carolina Convention, *id.* at 415-16.

⁹⁵ 2 M. FARRAND, *supra* note 86, at 92.

⁹⁶ *Id.* at 469 (remarks of J. Madison and J. Wilson).

⁹⁷ *THE FEDERALIST* No. 40, *supra* note 60, at 251; see Dellinger, *supra* note 22, at 284.

⁹⁸ See *supra* notes 36-37 and accompanying text.

⁹⁹ C. BEARD, *supra* note 60, at 217-18. Professor Brown took issue with Beard's adoption of the term "coup d'état" but conceded that "the whole procedure from the meeting of the Convention to the adoption of the Constitution was illegal from the standpoint of the Articles of Confederation." R. BROWN, *CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION"* 141 (1956).

¹⁰⁰ That is, in the positive law sense discussed above. Revolution may be, and often is,

cessity which outweigh the demands of legality. James Wilson of Pennsylvania, subsequently one of the nation's first great authorities on constitutional law, told his fellow delegates at Philadelphia that "[t]he House on fire must be extinguished, without a scrupulous regard to ordinary rights."¹⁰¹ While a revolution may never be legal, the weightiness of the reasons for it and the respect for the forces that initiated it may make it legitimate in the sense discussed above. For the reasons already suggested, this legitimacy depends upon the particular values and traditions of the society involved and, unlike matters of law, can never be the subject of any authoritative pronouncement by courts or legislatures.

The political actors who brought the Constitution into effect were well aware of the need for political, non-legal justifications for their actions. This is not to say that the abandonment of the established amending procedures was primarily based on the framers' appreciation of the jurisprudential underpinnings of constitutional law. Practical politics was a substantial consideration. The sweeping changes the framers desired simply could not acquire the approval of every legislature. James Wilson was blunt: "I am not for submitting the national government to the approbation of the state legislatures. I know that they and the state officers will oppose it."¹⁰²

But it would be an injustice to the founding fathers to suggest that their choice of methods was based on nothing more than crass, tactical, political factors. Their arguments for replacing Congressional and legislative approval with ratification by popularly elected, ad hoc conventions show that they understood that their proposed reform was more than just a revision within a continuing legal system. They knew that they were laying the foundation of a new legal system; that they were engaging, in this sense, in a revolution. They were consciously setting out what they hoped would be a new preconstitutional rule. This being the case, it was clear to them that the decision was a political one and had to be supported with political arguments. Consequently, they were willing to replace the "irrelevant" rules of the system because, as Gouverneur Morris said, "this Convention is unknown to the Confederation."¹⁰³ Instead, the

accompanied by the rhetoric of the law. This was surely the case with the American Revolution. But the "legality" appealed to there was, in essence, a variety of "natural law." See Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

¹⁰¹ 2 M. FARRAND, *supra* note 86, at 469.

¹⁰² 1 M. FARRAND, *supra* note 47, at 379. See 2 M. FARRAND, *supra* note 86, at 90 (remarks of N. Gorham); *id.* at 562 (remarks of J. Wilson); M. JENSEN, *supra* note 59, at 69. The political aspects of the ratification procedure were not lost on its opponents. Luther Martin, in his "Genuine Information" delivered to the Maryland legislature in Nov. 1787, noted that "the warm advocates of this system, fearing it would not meet with the approbation of Congress" and legislatures bypassed those bodies in order "to force it upon them, if possible through the intervention of the people at large." 3 M. FARRAND, *supra* note 61, at 228.

¹⁰³ 2 M. FARRAND, *supra* note 86, at 92.

real debate had to take place, in Wilson's language, "upon original principles."¹⁰⁴

The original principle upon which the advocates of the constitution relied was, above all, the sovereignty of the people.¹⁰⁵ Although there were differences as to its application, this concept was the universal dogma of American political thought at the end of the eighteenth century. On this idea the very independence of the American nation was founded. The Declaration of Independence recited the "self-evident" truth that governments "derive their just powers from the consent of the governed" and affirmed the ineradicable "right of the people to alter or abolish" their governments and to institute a new one "on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."¹⁰⁶ James Wilson, writing in 1791, distinguished the sources of authority on which the British monarchy was said to rest—an original contract between the king and the people, divine right, or even "the dark foundations of conquest"—from the only legitimate source of governmental power in America: "With us the power of magistrates, call them by whatever name you please, are the grants of the people."¹⁰⁷

The mere invocation of the sovereignty of the people, however, could not justify jettisoning the legal rules of the Articles and bypassing the Congress and the legislatures. Those institutions too could claim the authority of the people. In the late eighteenth century the classical notion of mixed government composed of institutions representing the different interests in society had given way to the idea that every organ of government derived its power solely from the sovereign people.¹⁰⁸ How, then, could an appeal to the people be the basis of an argument for circumventing their elected representatives? For ordinary decisions of law and government the ordinary lawmaking institutions might be adequate surrogates for the people. But when, in a constituent process, the character and powers of those institutions themselves were at issue, it was natural (if not logically necessary) that they be viewed as defective vehicles for the expression of the popular will.¹⁰⁹ If constituent questions were in the

¹⁰⁴ 3 M. FARRAND, *supra* note 61, at 143 (statement in the Pennsylvania Convention).

¹⁰⁵ See *id.* at 142-43; JENSEN, *supra* note 51, at 55.

¹⁰⁶ Declaration of Independence para. 2 (U.S. 1776).

¹⁰⁷ Wilson, *Lectures on Law*, in THE WORKS OF JAMES WILSON 316-17 (McCloskey ed. 1967).

¹⁰⁸ For a perceptive discussion of the changing nature of the recognized authority for government in this period in American history, see G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969). The older view was expounded by John Adams who defended constitutions mixing popular, aristocratic and monarchical elements. The newer view was exemplified in a criticism of Adams by John Stevens: "Government was not a balancing of people and aristocracy but only the distribution and delegation of the people's political power. . . . For Stevens the parts of government had lost their social roots. All had become more or less equal agents of the people." *Id.* at 584.

¹⁰⁹ See *id.* at 276.

hands of the ordinary legislatures it was incongruous to regard those legislatures as controlled by the resulting constitutional law.¹¹⁰ It followed that neither Congress nor the legislatures could be competent entirely to redefine their own relative powers. To do this, the people would have to speak with an alternate voice, one which was independent of, and which would transcend the agencies of government which were to be abolished or created.¹¹¹

The method for expressing the alternate, constituent voice in the United States had become obvious by 1787. This was the special constitutional convention. The revolution itself had been the product of ad hoc committees and assemblies.¹¹² While post-independence constitution-making in the states had, at first, been the work of the existing legislatures, the theoretical unsoundness of this technique was increasingly recognized,¹¹³ and special constitutional conventions were utilized.¹¹⁴ These assemblies could act outside of, and thus assert an authority prior to, the regular agencies of government which they were to define and limit. Furthermore, because of the peculiar nature of their task they could lay a special claim to represent the people in their constituent capacity.¹¹⁵ "It was an extraordinary invention," the historian, Gordon Wood has written, "the most distinctive institutional contribution it has been said, the American Revolutionaries made to Western politics. It not only enabled the Constitution to rest on an authority different from the legislature's but it actually seemed to have legitimized revolution."¹¹⁶ American political thought had already accommodated the propriety, in certain circumstances, of revolutionary resort to force. Now revolution had "become domesticated in America."¹¹⁷ The people could act peacefully and

¹¹⁰ See *id.* at 276-81; R. PALMER, *THE AGE OF DEMOCRATIC REVOLUTION* 340 (1969).

¹¹¹ R. PALMER, *supra* note 110, at 354-57.

¹¹² See *THE FEDERALIST* No. 40, *supra* note 60, at 252-53; G. WOOD, *supra* note 108, at 313-31. The spontaneous organization of the people of a community for the purpose of laying down the fundamental definition of their government goes back, in American history, as far as the Mayflower Compact in 1620 and the Fundamental Orders of Connecticut in 1639. See Arendt, *Constitutio Libertatis*, in *THE REINTERPRETATION OF THE AMERICAN REVOLUTION*, 1763-1789, at 579 (J. Greene ed. 1968).

¹¹³ See G. WOOD, *supra* note 108, at 276-309. Col. George Mason of Virginia saw a danger to the primacy of any Constitution founded on the exercise of the ordinary lawmaking powers of the state legislatures. 2 M. FARRAND, *supra* note 86, at 88-89.

¹¹⁴ See G. WOOD, *supra* note 108, at 318-43.

¹¹⁵ See *id.* at 328-31. For some contemporary observers the element of fiction in the distinction between the people represented in government and the people represented in convention was evident. Noah Webster asked what was special about a convention. It was only "a body of men chosen by the people in the same manner they choose members of the Legislature, and commonly composed of the same men; but at any rate they are neither wiser nor better. The sense of the people is no better in a convention than in a legislature." Quoted in *id.* at 379.

¹¹⁶ *Id.* at 342.

¹¹⁷ R. PALMER, *supra* note 110, at 356. See C. BEARD, *supra* note 60, at 222-25; Corwin, *The Worship of the Constitution*, 1 CORWIN ON THE CONSTITUTION 55 (Loss ed. 1981); Del-

legitimately outside the legal channels of political change.

The submission of the proposed constitution to special ratifying conventions in the states, therefore, swept away any legal objection to the Constitution. The people's constituent power was always held in reserve and could undo whatever legal and governmental systems it had created:

From [the people's] authority the Constitution originates; for their safety and felicity it is established; in their hands it is clay in the hands of the potter; they have the right to mould, to preserve, to improve, to refine and to finish it as they please. If so, can it be doubted that they have the right likewise to change it?¹¹⁸

On this view, the failure to follow established forms ceased to be a defect, it was, instead, the ratification process' great virtue. In fact, it was not the legitimacy of the Constitution which was in doubt. Rather, it was the Articles, which had issued, not from special institutions reflecting the original will of the people, but from the acts of ordinary legislatures which rested on a questionable footing. Hamilton wrote in *The Federalist* No. 22:

It has not a little contributed to the infirmities of the existing federal system, that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several legislatures it has been exposed to frequent and intricate questions concerning the validity of its powers, and had, in some instances, given birth to the erroneous doctrine of a right of legislative repeal. . . . The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority.¹¹⁹

The new Constitution would be approved by the people themselves and their "approbation [would] blot out antecedent errors and irregularities."¹²⁰

Of course it is possible to discern some distance between the abstract idea of the consent of the people and the actual ratification procedure in

linger, *supra* note 22, at 289-90.

¹¹⁸ Wilson, *supra* note 107, at 304. Compare the argument of Luther Martin against the legitimacy of ratification by ad hoc conventions:

[O]nce the people have exercised their power in establishing and forming themselves into a *State government*, it never devolves back to them, nor have they a right to resume or again to exercise that power, until such events take place as will amount to a *dissolution* of their *State government*. . . . [The proposed ratification procedure] has a tendency to set the *State governments* and their *subjects* at variance with each other, to lessen the obligations of government, to weaken the bands of society, to introduce anarchy and confusion, and to light the torch of discord and civil war throughout this continent.

L. Martin, *Genuine Information*, in 3 M. FARRAND, *supra* note 61, at 230 (emphasis in original).

¹¹⁹ THE FEDERALIST No. 22, at 152 (Bourne ed. 1901).

¹²⁰ THE FEDERALIST No. 40, *supra* note 60, at 233 (Madison). See G. WOOD, *supra* note 108, at 533-34.

state conventions. Even if we put aside our modern conviction that the definition of "the people" ought not to be restricted by considerations of race, sex and wealth,¹²¹ significant questions remain about the results of 1787-89. It seems clear there was some chicanery in the process.¹²² Estimates of the proportion of the population actually favoring the Constitution are largely guesswork but most observers agree that the division was a close one.¹²³

These real questions, however, are largely beside the point under consideration. The concern here is with the extent to which the ratification process contributed to the legitimacy of the new Constitution in light of its patent departure from the legality of the Confederation. The debate on the Constitution was a truly national one and, for the intelligence and intensity which the opposing sides brought to it, was remarkable for any time and place.¹²⁴ That debate culminated in the state conventions. The decisions made by majorities at those conventions were the best devices available for approximating what would be perceived by winners and losers alike as the popular will. The result was that the Constitution was regarded as the product of a process in which the ultimate source of legitimacy, the sovereignty of the people, was expressed as fully and as clearly as the accepted political beliefs and institutions of the time allowed.¹²⁵

To summarize, the establishment of the United States Constitution in 1787-89 illustrates plainly the distinction between legality, which is only meaningful within a given legal system, and the legitimacy of a change in the legal system which must be based on political and social considerations. This clarity is a result of the obviousness of the existing legal rules for change and the candor with which the framers rejected them. The reaction of anti-Federalists to the breach of legality was vociferous.¹²⁶ The advocates of the Constitution could not respond to these critics on their own terms. The unavailability of a legal defense forced to the surface the contention that the Articles could not control the will of the people, that no system of law could govern the authority from which it derives.¹²⁷

V. THE CREATION OF THE CANADIAN CONSTITUTION: 1980-82

I think at this point we hear them say, "Well, it may be legal. Maybe

¹²¹ See J. ELY, *DEMOCRACY AND DISTRUST* 6 (1980).

¹²² See J. MAIN, *THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781-88*, at 187-248 (1961).

¹²³ See *id.* at 249; C. BEARD, *supra* note 60, at 237-38; M. JENSEN, *supra* note 51, at 138-46.

¹²⁴ See M. JENSEN, *supra* note 51, at 122; J. MAIN, *supra* note 122 *passim*.

¹²⁵ The rapidity with which the Constitution came to be accepted evidences the acceptability of the ratification process in terms of the political values of the period. See *infra* notes 233-42 and accompanying text.

¹²⁶ See generally *THE ANTI-FEDERALIST*, *supra* note 70.

¹²⁷ Cf. Ross, *supra* note 44.

that is the way it has always been done. Maybe technically, in law, you can do it. But"—and then we use the big notion—"it is not legitimate; it is legal but it is not legitimate."¹²⁸

Pierre E. Trudeau, 1981

As the United States in the 1780's struggled to find a foundation upon which to rest an effective structure of law and government, so did Canada, over a much longer period in the twentieth century, struggle to arrive at a process or authority which could authorize and control an entirely Canadian Constitution. Those problems were brought to a head in 1980 when the federal government announced its intention to take steps to patriate the Constitution and establish a Charter of Rights on the sole Canadian authority of the Houses of the Federal Parliament and, pointedly, without the consent of the governments or legislatures of the provinces. The decisions which followed determined a new shape for a final and plenary authority over all Canadian law. They thus prescribed a new preconstitutional rule. In that debate, and in retrospect, for reasons already discussed,¹²⁹ questions of legitimacy appear at the heart of the controversy.

A. *The Relevance of Legality in Patriation*

It has already been argued that an independent legal system must ultimately be premised on political and social circumstances and cannot, in the final analysis, rest on a claim of legality.¹³⁰ The establishment of the United States Constitution illustrated that distinction with unusual clarity given the explicit rejection of the legal constraints of the Articles and the plain articulation of the political justification for the creation of the new regime.

An examination of the events in Canada in 1980-82 would, at first, seem to belie this claim with respect to the institution of the new Canadian Constitution. The debate centered, in substantial degree, on the resolution of what were seen as questions of law. There was, moreover, almost no explicit recognition that the matter could not be resolved by recourse to legal rules. This attitude may be attributed to the largely unquestioned decision to effect the constitutional change through the formal legal mechanism of amendment by the United Kingdom Parliament. This context had the result of structuring the argument to produce an undue concentration on form to the neglect of the substantive sources of the power to establish a Constitution.

The fact that a foreign law exists authorizing the constitutional arrangements of another country is, however, hardly conclusive on the

¹²⁸ Statement of the Prime Minister, *supra* note 37.

¹²⁹ See *supra* notes 19-46.

¹³⁰ See *supra* notes 24-31 and accompanying text.

question of the basis of the legal system of that country.¹³¹ If it were, the authority of the United Kingdom over the independent members of the Commonwealth would be unimpaired and the legitimacy of their governments would be traceable to some continuing attitudes of fealty to the English Queen in Parliament. No one in Canada believes that any substantive power over Canadian affairs has existed at Westminster for many years.¹³² Reverence for the authority of the United Kingdom Parliament is no part of the reason that Canadian law is effective in Canada.¹³³

In light of these considerations it is ironic that the federal government's principal justification for its proposed unilateral action was legal.¹³⁴ This contention was premised on the fact that all Canadian constitutional rules were founded, directly or indirectly, on British statutes and that the sole right to alter those arrangements was in the United Kingdom Parliament. Moreover, that right could be exercised on anyone's initiative, and no rule of law prevented any one from asking for any amend-

¹³¹ See J. RAZ, *supra* note 32, at 127-28; Hart, *Kelsen's Doctrine of the Unity of Law*, in *ETHICS AND SOCIAL JUSTICE* 179-93 (H. Kiefer & N. Munitz eds. 1970); Knopff, *supra* note 38, at 59-60.

¹³² Knopff, *supra* note 8, at 52-53; Slattery *supra* note 8, at 396-99; Kennedy, *The Statute of Westminster*, 45 *JURID. REV.* 330, 338 (1933).

¹³³ Hart states:

It is still true that much of the constitutional structure of the former colony is to be found in the original statute of the Westminster Parliament: but this is now only an historical fact, for it no longer owes its contemporary legal status in the territory to the authority of the Westminster Parliament. The legal system in the former colony has now a "local root" in that the rule of recognition specifying the ultimate criteria of legal validity no longer refers to enactments of a legislature of another territory. The new rule rests simply on the fact that it is accepted and used as such a rule in the judicial and other official operations of a local system whose rules are generally obeyed.

H. HART, *supra* note 24, at 117.

The role of the United Kingdom Parliament in the amendment of the Canadian Constitution might be characterized not as the maintenance of a formal colonial relationship but as a feature of a domestic, Canadian legal procedure in which Westminster acts as an agency of Canadian law. See Slattery, *supra* note 30, at 401. This would not change the basic argument in text. For under this view it is equally true that the British Parliament's role is entirely formal and that an emphasis upon it, instead of upon the non-legally defined Canadian attitudes and behavior, would give a misleading picture of the patriation process as one governed by positive law.

¹³⁴ J. CHRETIEN, *THE ROLE OF THE UNITED KINGDOM IN THE AMENDMENT OF THE CANADIAN CONSTITUTION* 5 (1981) (official publication of Canadian Ministry of Justice) ("Canadians take pride in the fact that our Constitution unlike those of many nations, is entirely lawful both in its origins and its subsequent development"); W. LEDERMAN, *supra* note 34, at 85 ("If we are to have legitimate as distinct from revolutionary change, then the present method of amendment focused on London should be followed one last time." *Id.* at 88.); *Factum of the Attorney General of Canada*, *supra* note 11, at 63 ("The Parliament of the United Kingdom has full legal authority over amendments to the Constitution of Canada. And, because there is no amending power conferred on any Canadian authority to amend certain parts of the Constitution, the Parliament of the United Kingdom has the sole legislative authority to amend those parts").

ment at all.¹³⁵

On its own terms this argument is as unexceptionable¹³⁶ as was the contention that the ratification and institution of the United States Constitution was a breach of legality. However, the substantive inadequacy of this position, which was based on the legal competence of Westminster to define Canadian law, is clear. The formal legal authority of the United Kingdom Parliament over Canada is *colonial* authority.¹³⁷ One fact upon which every responsible participant in the Canadian constitutional debate agreed was that, as a political matter, Canada was a sovereign and independent nation.¹³⁸ If there were ever a case where legality was insufficient to confer legitimacy, this was it.

It may be objected that a procedure has now been established by which a new legal system may, in fact, be founded on an act of law. More particularly, a colonial authority might, by a legal act of abdication, purport to establish an independent legal system in a former colony.¹³⁹ Indeed, the United Kingdom has consistently utilized such legal formulas in recognizing the independence of its former colonial territories. Such abdication amounts to a permanent renunciation of legal authority and may be likened to the execution of a deed in which dominion over property is irreversibly transferred to another person. The Canada Act 1981 contains such an abdication clause declaring that henceforth "[no] Act of the Parliament of the United Kingdom . . . shall extend to Canada as part of its law."¹⁴⁰

It seems clear that such an action cannot, itself, be the actual source of authority for the new legal system. Where political events have, in fact, so changed attitudes and behavior that adherence to the rules of the legal

¹³⁵ The Canadian parliamentary address to the Queen, on this view, was of no juridical significance at all. It was, argued counsel for the federal government before the Supreme Court of Canada, indistinguishable, as a matter of law, from a parliamentary birthday greeting to the Queen. R. ZUKOWSKY, *supra* note 8, at 100.

¹³⁶ *Constitutional Amendment References*, 39 N.R. at 50 (Majority Law).

¹³⁷ See Manitoba Constitutional Amendment Reference, [1981] 2 W.W.R. 193, 250, 7 Man. R.2d 269, 330-31, 117 D.L.R.3d 1, 53 (O'Sullivan, J.A., dissenting); Kerr, *Constitution Act, 1980: Is it Constitutional?*, 30 U.N.B. L.J. 73, 86 (1981); Knopf, *supra* note 8, at 50-51.

A different view is possible. See *supra* note 133. Even if the United Kingdom Parliament's authority is rooted in Canadian law, the universally acknowledged lack of substantive competence, makes reliance on this formal legal power alone an inadequate justification.

¹³⁸ See J. CHRETIEN, *supra* note 134, at 5; HOUSE OF COMMONS (U.K.), FIRST REPORT FROM THE FOREIGN AFFAIRS COMMITTEE, 1980-81: BRITISH NORTH AMERICAN ACT—THE ROLE OF PARLIAMENT xvi; Slatery, *supra* note 30, at 390-96.

¹³⁹ S. DESMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 85-87 (4th ed. 1981); P. HOGG, *supra* note 33, at 26-27. Justice Rand suggested that the Imperial Conferences of 1926 and 1930 and the Statute of Westminster amounted to such a legal abdication in the case of Canada and the other Dominions. Rand, *Some Aspects of Canadian Constitutionalism*, 38 CAN. B. REV. 135 (1960). The same idea underlies the often quoted dictum in *Ndlwana v. Hofmeyr*, 1937 A.D. 229, 237, that "[f]reedom once conferred cannot be revoked."

¹⁴⁰ Canada Act, 1981 § 2.

system cannot be attributed to any subsisting obligation to the law of the mother country, abdication is no more than a formal solution to a formal problem. It corrects the paper record to reflect the actual understanding of the relevant legal actors.¹⁴¹ If, on the other hand, it is the act of abdication that really accounts for adherence to the rules of the new legal system, it will then be ineffective as a true abdication. The authority of the new system continues to rely entirely on the felt obligation to the prior regime, which might, by the same token, re-assert its authority and again legislate directly for the colony.¹⁴²

Two examples may make this more clear. The *legal* action establishing the independence of the United States was the Treaty of Paris of 1783 (or, by some accounts, the repeal of the Declaratory Act of 1766 in 1964).¹⁴³ It is clear though that the basis of legitimacy of the United States legal system in 1783 (and certainly in 1964) was not the belated recognition of the British Crown. In contrast, the United Kingdom Parliament declared in the Ireland Act of 1949 that Northern Ireland would not cease to be part of the United Kingdom without the consent of the Parliament of Northern Ireland. In 1973, however, the United Kingdom Parliament repealed that provision in the course of re-establishing direct British rule in Ulster, and replaced it with a guarantee defeasible only on "the consent of the majority of the people of Northern Ireland, voting in a poll."¹⁴⁴ Parliament's previous legal renunciation of complete control over the fate of the province was insufficient to prevent this unilateral change in the conditions of Northern Ireland's legal existence. It did not, therefore, effect an irreversible transfer of that aspect of sovereignty from the British to the Northern Ireland legal system.¹⁴⁵

¹⁴¹ See *Blackburn v. Attorney General*, [1971] 2 All E.R. 1382 (Denning, J.), quoted in *Constitutional Amendment References*, 39 N.R. at 32 (Majority Law); S. DESMITH, *supra* note 139, at 76-77; H. HART, *supra* note 24, at 117.

¹⁴² See Ross, *supra* note 44, at 5-6; cf. J. FAWCETT, *THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW* 94 (1963). Of course, if the autonomy-conferring organ simultaneously dissolves itself, as might be the case in a succession of legal systems in the same society, the problem is considerably more complicated. See S. DESMITH, *supra* note 139, at 84; Ross, *supra* note 44 *passim*.

It is possible that the abdication itself might so alter political beliefs that, after a time, resumption of authority will no longer be possible. In that event, of course, it will not be the legal but the social-psychological aspects of the abdication which will be effective.

¹⁴³ See S. DESMITH, *supra* note 139, at 75.

¹⁴⁴ Quoted in Hood-Phillips, *Self Limitation by the United Kingdom Parliament*, 2 HASTINGS CONST. L.Q. 443, 445 (1975).

¹⁴⁵ See *id.* at 472. The Irish legislation was not in the same form as modern Independence Acts, and the grant was, in no way, one of independence. But the comparison is still instructive as to the indeterminacy of the effect of a purported permanent renunciation of legal power. In the case of Rhodesia, the attempt to withdraw a similar legislative pledge of self-government was ineffective because of significantly different political and social circumstances. See *R. v. Ndhlovu*, [1968] 4 S.A.L.R. 515. In the case of attempted abdication by the United Kingdom, a further difficulty is presented by what is commonly advanced as an axiom of British constitutional law that no parliament may bind its successor. See S.

Thus, legal abdication is either a formal or a futile action. Indeed, it might be argued that in cases like that of Canada, where actual political and legal independence is beyond dispute, legal abdication should be avoided because it obscures the fact of independence, appearing to leave open the possibility of the re-assertion of colonial control.¹⁴⁶ It may be argued that such legal forms should purposely be spurned in favor of formal actions which are explicitly *illegal* in terms of the prior system. That is, legal forms should mirror political reality. The only truly independent legal system, on this view, is an autochthonous one in which the preconstitutional rule is formally, as well as actually, rooted in domestic political authority.¹⁴⁷

In any event, these considerations go only to the form in which a separate legal system is established. Once the autonomy of a legal system is conceded, it is a separate question as to what is its actual (political) basis. Whether Canada's independence was to be recognized by abdication of the United Kingdom, or by extralegal declaration at home, did not affect the critical question of constituent authority in 1980-82: "What existing sources of Canadian authority are competent to establish the constitutional rules which will govern the legal system of Canada and changes in it?" An inquiry into that underlying question had to consider the sociology, history and political morality of Canada.¹⁴⁸ It was a matter not of legality, but of legitimacy.

B. The Legitimacy of the Patriation Process

1. Alternative Bases of Legitimacy

Given the multifaceted nature of an inquiry into the legitimacy of the basis of a legal system, the possibilities in a complicated, developed society are legion. In the United States in 1787-89, near universal acceptance of the concept of popular sovereignty and the established role of the ad hoc convention quickly focused the debate. In Canada, the argument in 1980-82 resolved itself into a choice between only two possibilities. One, associated with the federal government, posited that the federal Parliament, by itself, was a proper source for the establishment of fundamental legal rules. The second, advocated by the dissenting provinces,

DESMITH, *supra* note 139, at 84-87.

¹⁴⁶ See J. FAWCETT, *supra* note 142, at 94.

¹⁴⁷ See *id.* at 94-96; S. DESMITH, *supra* note 139, at 74-75; H. WADE, *supra* note 30, at 29; Finnis, *supra* note 19, at 50-51. Consideration was given to the desirability of an autochthonous source of Canadian law in G. FAVREAU, *supra* note 14, at 51-53. See also Russell, *Bold Statescraft, Questionable Jurisprudence*, in *AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT 210, 233* (K. Banting & R. Simeon eds. 1983). An attempt was made to secure both autochthony and legality in the formula proposed for effecting the ill-fated "Victoria" amending formula in 1971. See Strayer, *supra* note 34, at 3-14 to 3-15. A clear discussion of the problem is found in P. HOGG, *supra* note 33, at 24-26.

¹⁴⁸ See *supra* notes 23-33 and accompanying text.

contended that legitimate constituent authority had to include both the federal Parliament and the legislatures or governments of the provinces.¹⁴⁹

There was very little discussion in the constitutional debate of any other possible device for instituting new constitutional rules. In particular, the only options seriously considered involved agreement among one or another combination of existing governmental institutions. In a society with widely shared democratic principles, one might have expected consideration of some extraordinary decision-making mechanism, some analogue of the American Constitutional Convention, to insure an exceptionally broad degree of consensus. Such a wide consensus would be less likely to emerge from the assent of ordinary majorities of representatives elected for ordinary governmental purposes.¹⁵⁰ In fact, the existing governmental agencies might be thought particularly ill-suited to making fundamental permanent constitutional rules since these agencies would tend to be biased toward short term, partisan considerations.¹⁵¹

In contrast, one of the most salient features of the process leading to the United States Constitution was the deliberate bypassing of existing governments, both state and federal, in favor of a form of direct recourse to "the people outdoors" exercising its power through extraordinary conventions.¹⁵² Since that time, such exceptional procedures have been the rule in national constitution-making. Some utilization of special constitutional conventions or assemblies and popular approval in a referendum represents the most common technique to establish modern

¹⁴⁹ R. ZUKOWSKY, *supra* note 8, at 2-3.

¹⁵⁰ A.V. Dicey writes:

It is, I think of immense importance that people should realize that a small and transitory political majority, though it necessarily exercises the power, has not the authority of the nation. . . . [O]n matters of constitutional change I do not think a small majority has any moral right to act with vigour. The presumption is in favour of the existing state of affairs, because on the whole it may be assumed to be the permanent will of the nation. Add to this that a constitutional change once made is, or ought to be, final, and therefore ought not to be made by any body of men who do not clearly represent the final will of the nation.

A.V. Dicey to L. Maxse, Jan. 1, 1895, *quoted in* R. COSGROVE, *THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST* 161 (1980). An argument that popular approval in a referendum is required to assure the legitimacy of basic constitutional reform is made in Remillard, *supra* note 34, at 200-01. *See also* Whitaker, *Democracy and the Canadian Constitution*, in *AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT 240* (K. Banting & R. Simeon eds. 1983); Kerr, *supra* note 137, at 90.

¹⁵¹ *See* Cairns, *Constitution-Making, Government, Self-Interest and the Problem of Legitimacy in Canada* (H. Clarke & A. Kornberg eds. compilation as yet untitled) (forthcoming, Duke); Cairns, *The Politics of Constitution-Making: The Canadian Experience*, in *REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE* (K. Banting & R. Simeon eds.) (forthcoming, Macmillan) [hereinafter cited as Cairns, *The Politics of Constitution-Making*]; Whitaker, *supra* note 150.

¹⁵² *See supra* notes 93-96 and accompanying text.

constitutions.¹⁵³

But since constitutional legitimacy turns on actual attitudes towards the source and content of a governing constitutional rule, any inquiry must be specific as to time and place and will depend upon the traditions and values of the particular society whose legal system is under study.¹⁵⁴ The history of government in Canada has revealed a consistent satisfaction and pride in parliamentary democracy. What little experience Canada has had with referenda has not been completely happy.¹⁵⁵ Consequently, the failure of Canada to resort to such procedures is not entirely surprising.

2. Unanimous Governmental Consent

Little controversy existed as to the sufficiency of the process for instituting constitutional change advocated by the dissenting provinces—unanimous agreement among provincial and federal governments. Only its necessity was put into issue. Indeed the propriety of this procedure had been, more or less, taken for granted for many years in the continuing discussions on the establishment of a domestic amending procedure.¹⁵⁶ This position was often associated with the contention that confederation represented a compact among the provinces which could not be altered without the consent of the contracting parties. This “compact theory” has often been attacked as lacking any basis in law.¹⁵⁷ But for questions of constitutional legitimacy, questions of law cannot be determinative. There is little doubt that, in terms of the history and political values of Canada, the compact theory represents an important fact.¹⁵⁸

¹⁵³ Although it never emerged as a prominent theme, there was some advocacy of extraordinary, ad hoc procedures in the Canadian constitutional debate. It was at one time thought that Prime Minister Trudeau might be considering a referendum to bypass the provincial officials. See MACLEAN's, June 23, 1980, at 18-19; Kerr, *supra* note 137, at 90. As early as 1922, Sir Clifford Sifton suggested a special constituent assembly with subsequent approval in a referendum. Sifton, *Some Canadian Constitutional Problems*, 3 CAN. HIST. REV. 3, 9-10 (1922). Professor Lederman has also discussed the possibility of a constituent assembly but, remarkably, suggested that it could only operate within limits agreed upon by federal and provincial authorities, and even then, only if authorized by the United Kingdom Parliament. W. LEDERMAN, *supra* note 34, at 88.

¹⁵⁴ As to the relationship of changed attitudes and values to arrangements previously regarded as legitimate, see *infra* notes 219-31 and accompanying text.

¹⁵⁵ Most prominent was the referendum on conscription in World War I which revealed a marked discrepancy between the preferences of French and English speaking Canadians. K. McNAUGHT, *THE PELICAN HISTORY OF CANADA* 267 (1976). Professor Lederman contrasts such extraordinary procedures with those “that [arise] naturally out of our history and traditions and which [use] our existing legislative and executive institutions of government.” W. LEDERMAN, *supra* note 34, at 89; see Strayer, *supra* note 34, at 33-34.

¹⁵⁶ See P. GERIN-LAJOIE, *CONSTITUTIONAL AMENDMENT IN CANADA* 168 (1950); Alexander, *A Constitutional Straitjacket for Canada*, 43 CAN. B. REV. 262, 268 (1965).

¹⁵⁷ Bastedo, *Amending the British North America Act*, 4 CAN. B. REV. 209, 212-19 (1934).

¹⁵⁸ “Theories whether of a full compact theory . . . or of a modified compact theory . . .

Constitutional events since before confederation in 1867 have taken into account an assumed irreducible minimum of provincial political autonomy. Moreover, various political interests have found expression through provincial officials.¹⁵⁹ When concentrating on legitimacy as opposed to legality, therefore, "[i]t is a matter not of 'the federal compact' but of the 'federal principle.'"¹⁶⁰ The creation of a constitution by unanimous agreement of all governments in Canada with formal enactment by the United Kingdom Parliament would have aroused little dispute about its legitimacy.¹⁶¹

3. Unilateral Action by the Federal Parliament

Given the inattention to non-governmental alternatives and the lack of controversy over the adequacy of the provincial position, the constitutional debate in Canada in 1980-82 centered on the expressed intention of the federal government to establish new constitutional arrangements on the sole initiative of the houses of the federal Parliament.¹⁶² As noted, this procedure was defended as a lawful means of changing the Constitution. But its advocates also claimed that given the history and values of Canada, the federal plan was a politically appropriate means of establishing and defining a basic constitutional authority for the Canadian legal system. These were arguments of legitimacy.

One aspect of this defense was the fact that the federal Parliament was the sole political institution in Canada in which all the people were represented. This argument supported a claim that the federal Parliament could democratically express the will of the Canadian nation.¹⁶³ The appeal of this argument, however, was severely limited. Opponents pointed out that Parliament was elected under the existing constitutional system, in which its powers were restricted to subjects specified in the British North America Acts.¹⁶⁴ Those topics were not commonly under-

operate in the political realm, in political science studies. They do not engage the law. . . ." *Constitutional Amendment References*, 39 N.R. at 52 (Majority Law).

¹⁵⁹ See G. STANLEY, *A SHORT HISTORY OF THE CANADIAN CONSTITUTION* 91-96 (1969); Kennedy, *The Imperial Conferences, 1921-1930: The Statute of Westminster*, 48 L.Q. REV. 191, 208 (1932).

¹⁶⁰ Wade, Memorandum to the Foreign Affairs Committee (U.K.) (Dec. 10, 1980).

¹⁶¹ As has been noted, in addition to the procedure originating them, the substance of any new constitutional rules could not, consistent with a plausible claim of legitimacy, be radically out of line with well established Canadian political traditions, including the preservation of the federal structure. Unanimous assent, however, would surely have been generally thought sufficient to legitimate any of the various amending formulas seriously discussed in 1980-82.

¹⁶² R. ZUKOWSKY, *supra* note 8, at 66-70.

¹⁶³ "Through the one institution in which all Canadians are represented, the Parliament of Canada, Canadians can break the deadlock among their eleven governments." Statement by Prime Minister Trudeau on Constitutional Change (Oct. 2, 1980); see Cairns, *The Politics of Constitution-Making*, *supra* note 151.

¹⁶⁴ See Kerr, *supra* note 137, at 81; Schwartz, *supra* note 8; *General National Agree-*

stood to include a plenary constituent power. Certainly the 32nd Parliament sitting in 1980-82 was not elected as a constituent assembly, but to carry out the ordinary business of government.

The burden of the argument on behalf of unilateral action by the federal Parliament rested on precedent. Its proponents asserted that throughout Canadian history the agreement of the House and Senate of Canada had been a necessary and a sufficient condition to amendment of the British North America Acts. While conceding that, on occasion, the consent of provincial officials had first been sought and secured, these incidents were explained as measures of short-term political prudence and not prerequisites to the legitimacy of the proposed amendments.

The correct interpretation of these precedents became subject of intense argument and extensive commentary¹⁶⁵ and was the subject of the opinions of the Supreme Court of Canada in the *Constitutional Amendment References*. One of the three principal questions raised in those cases concerned the existence of a constitutional convention requiring provincial consent.¹⁶⁶ That question amounted to the presence or absence of certain political preconditions to the exercise of what was assumed (and had been decided) to be legal governmental power—the power to request an amendment from the United Kingdom Parliament. And since, as has been argued, that power was to be exercised to establish the basis of an essentially new constitutional regime, the question was one of constitutional legitimacy in the sense described above.¹⁶⁷

It should be noted that the relevance of those precedents to an evaluation of the proposed federal actions of 1980-82 is problematic. There is a critical difference between enacting substantive amendments to an existing constitutional system and—by specifying a new amendment procedure, a new ultimate legal authority,—the founding of an essentially new system.¹⁶⁸ What might be an adequate procedure for the former might still be deemed insufficient for the latter. But even assuming their materiality, the inferences drawn by the federal government as to the political lessons of the amending history appear to have been mistaken.

On the surface, the federal explanation was impressive. Since 1867, the British North America Acts were amended by the United Kingdom Parliament twenty-two times.¹⁶⁹ Of those amendments, only four were re-

ment: *The Legal Sanction for Constitutional Reform in Canada*, 6 QUEENS L.J. 513a (1981).

¹⁶⁵ See, e.g., the various opinions in *Constitutional Amendment References*, 39 N.R. at 13-14; Kerr, *supra* note 137; Schwartz, *supra* note 8. The most thorough study of past amendments is P. GERIN-LAJOIE, *supra* note 156. A much cited discussion is the "White Paper" prepared by the federal Minister of Justice in 1965. G. FAVREAU, *supra* note 14.

¹⁶⁶ *Constitutional Amendment References*, 39 N.R. at 13-14.

¹⁶⁷ "Question 2 is not confined to an issue of pure legality but has to do with a fundamental issue of constitutionality and legitimacy." 39 N.R. at 196; see also *id.* at 192-93.

¹⁶⁸ See *supra* notes 139-42 and accompanying text.

¹⁶⁹ What exactly amounts to an amendment to the Canadian Constitution is not clear. British statutes amending the British North America Act, other British statutes affecting

quested after the consent of all the provinces had been secured.¹⁷⁰ But to look only at this raw statistic may be misleading.

The majority of the Supreme Court concluded that the only relevant precedents were those amendments in which the powers of the provinces had been explicitly reduced. When those amendments were examined, it was found that provincial consent had *always* been present.¹⁷¹ This determination may have been the result of a limited reading of the particular convention the Court was asked to consider. In particular the majority ignored amendments which, while not dealing expressly with provincial power, might have had a significant adverse effect on relative provincial authority.¹⁷²

But a more expansive inquiry into the promulgation of prior amendments leads to the same conclusion.¹⁷³ When considering a possible legitimate source of constituent power in a legal system, certain historical material is necessarily irrelevant. Precedents occurring at a time when prevalent attitudes and beliefs about proper government authority were significantly different, cannot illuminate the current perceptions that must support a claim of legitimacy.¹⁷⁴ In particular, the political basis of events occurring prior to the independence of the Canadian legal system can be of little assistance. By definition, those acts were premised on a preconstitutional rule which included the propriety of substantive partici-

Canada and mere orders-in-council have all been included. See P. GERIN-LAJOIE, *supra* note 156, at 47. Twenty-two is the number used in G. FAVREAU, *supra* note 14, at 5-7. It has been accepted as an appropriate list by all the members of the Supreme Court of Canada. See *Constitutional Amendment References*, 39 N.R. at 199-203 (Majority Convention), 268-72 (Dissent Convention).

¹⁷⁰ *Constitutional Amendment References*, 39 N.R. at 276 (Dissent Convention). See A Paper on Constitutional Amendment and Patriation 7 (Public Affairs Division, Canadian Embassy, Washington, D.C., Oct. 1980).

¹⁷¹ *Constitutional Amendment References*, 39 N.R. at 205-08 (Majority Convention).

¹⁷² In the Manitoba and Newfoundland references the Court was asked about amendments "affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada, to the provinces, their legislatures or governments." The question in the Quebec reference dealt with amendments that "affect . . . the legislative competence of the provincial legislatures in virtue of the Canadian Constitution [or] the status or role of the provincial legislatures or governments with the Canadian Federation." 39 N.R. at 187. The dissent suggested that a broader reading was called for and felt that amendments that had a significant impact on provincial interests ought to be included among the relevant precedents. *Id.* at 272 (Dissent Convention).

¹⁷³ The Court's inquiry with respect to a constitutional convention was reduced to a rather narrow and formulaic exercise inappropriate to the less easily defined question of legitimacy considered here. See Colvin, *supra* note 34, at 17. This approach to conventions became even more pronounced in the Matter of a Reference to the Court of Appeal of Quebec Concerning the Constitution of Canada. Attorney-General of Quebec v. Attorney-General of Canada, 140 D.L.R.3d 385 (Can. 1982); see *infra* notes 214-15 and accompanying text.

¹⁷⁴ That is to say, arguments about legitimacy raise questions necessarily peculiar to the perceptions and attitudes existing at the time the constitutional arrangements are brought into question. See *infra* notes 219-51 and accompanying text.

pation by the United Kingdom in the determination of the law of Canada. The timing of Canadian legal independence is the subject of apparently endless discussion, but for the purpose of evaluating the relevance of events leading to prior constitutional amendments, a reasonable line may be drawn between the amendments of 1916 and 1930.¹⁷⁵ It is fair to say, that for some period ending after 1916, it would have been misleading to speak of a legitimate constituent power in Canada which excluded the political authority of the United Kingdom.¹⁷⁶ The procedures leading to amendments in colonial Canada, when every agreement and action took place under the shadow of potential colonial intervention, can say very little about what creates a legitimate constituent power in independent Canada.

The record of amendments subsequent to 1916 provides far less com-

¹⁷⁵ See Strayer, *supra* note 34, at 3-8 to 3-9 ("So in this interlude between the wars it was clearly confirmed that the political legitimacy for Canadian constitutional amendments must be found in Canada").

Drawing the line between the 1916 and 1930 amendments ignores the Statute Law Revision Act 1927 which repealed two obsolete provisions of the British North America Act and was passed with no consultation in Canada at all. See P. GERIN-LAJOIE, *supra* note 156, at 129-31.

A much cited opinion on the time of independence is that of the Supreme Court of Canada: "There can be no doubt now that Canada has become a sovereign state. Its sovereignty was acquired in the period between its separate signature on the Treaty of Versailles in 1919 and the Statute of Westminster in 1931." In re Ownership of Off-Shore Mineral Rights, 1967 S.C.R. 792, 816. An official government publication asserted that independence was practically complete by the end of the First World War though not "formally announced" until the Balfour Declaration of 1926. G. FAVREAU, *supra* note 14, at 17. There are plenty of other opinions. See P. HOGG, *supra* note 33, at 2-3 n.5; Slattery, *supra* note 8, at 390-92.

The absence of legal independence before World War I is evidenced by the events leading to the amendment of 1907. While the explanation of those events is subject to dispute, it is clear that language not proposed by federal authorities was inserted in London by the Colonial Office. This was done, at least in part, in response to complaints by the government of British Columbia. See HOUSE OF COMMONS (U.K.), FIRST REPORT OF THE FOREIGN AFFAIRS COMMITTEE, *supra* note 138, at xxiii, xxxiii; P. GERIN-LAJOIE, *supra* note 156, at 80-83. But see J. CHRETIEN, *supra* note 134, at 27.

Indeed even a 1931 date for independence may be too early. With respect to foreign affairs, considerable ambiguity as to Canadian autonomy continued for some time. Independent Canadian diplomatic relations were not common until after the onset of the Second World War. See G. STANLEY, *supra* note 159, at 181. While independent diplomatic representation was instituted in Washington in 1927, it was not raised to the ambassadorial level until 1943. *Id.* Great significance is placed on Canada's separate declaration of war in 1939 a week after the British declaration, thus establishing that Canada could abstain while the United Kingdom was at war. See *id.* at 192; W. LEDERMAN, *supra* note 34, at 79; K. McNAUGHT, *supra* note 155, at 263. But this aspect seems far outweighed by the fact that Canada did go to war only one week later, entering a conflict when its own national interests were not obviously in immediate peril, and although Canadian leaders had been questioning the wisdom of participation in any European war. *Id.* at 260-63. Without doubt what brought Canada into the Second World War in 1939 was not any independent consultation of its own interests but the fact that the United Kingdom was at war.

¹⁷⁶ See P. HOGG, *supra* note 33, at 3, 13-14.

elling support for the claim of the federal government. Of the ten amendments initiated in Canada since 1916, five were secured only after the agreement of all provincial governments, and one was obtained only after agreement among all the provinces directly involved.¹⁷⁷ The amendment providing the closest parallel to the decisions of 1980-82 was the Statute of Westminster of 1931 which gave statutory form to the political and legal independence of the Dominions of the British Commonwealth.¹⁷⁸ The specifically Canadian provisions of the statute were included precisely to dispel any inference that the statute would have vested constitutional amending power in the federal parliament alone. True to that purpose, those provisions were drafted in response to provincial concerns and only after agreement between the federal and provincial governments.¹⁷⁹

It is true that four amendments in the post independence period were obtained without provincial consent and in some cases over provincial protest.¹⁸⁰ The Supreme Court of Canada discounted the importance of these precedents on the grounds that the amendments at issue did not directly reduce the legislative powers of the provinces.¹⁸¹ It may be that the Court did not adequately consider the indirect effect these amend-

¹⁷⁷ See *Constitutional Amendment References*, 39 N.R. at 203-05. The Amendment of 1930 confirmed provincial ownership of natural resources in Manitoba, British Columbia, Alberta and Saskatchewan and was assented to by the federal Parliament and the legislatures of those four provinces. Although questions were raised in the debate in the federal Parliament as to the need for consent by other provinces, this amendment is included here with those amendments receiving unanimous agreement because the federal government's response to those questions, emphasized that the amendment had no effect beyond those four provinces, cf. *infra* note 183 and accompanying text, and also that there had been unanimous, although informal, approval by the provincial governments at the Dominion-Provincial Conference of 1927. See P. GERIN-LAJOIE, *supra* note 156, at 92-93.

This listing omits the Statute Law Revision Act, 1950 which repealed an obsolete provision of the British North America Act, 1867, and was enacted without prior consultation with Canadian officials. See *Constitutional Amendment References*, 39 N.R. at 202-03 (Majority Convention).

¹⁷⁸ See P. GERIN-LAJOIE, *supra* note 156, at 186-88.

¹⁷⁹ Accounts of the process leading up to the drafting of section 7 of the Statute of Westminster may be found in *Constitutional Amendment References*, 39 N.R. at 39-47; G. FAVREAU, *supra* note 14, at 19; P. GERIN-LAJOIE, *supra* note 156, at 92-104; P. HOGG; *supra* note 33, at 18. In J. CHRETIEN, *supra* note 134, at 8-9, it is argued that the provinces feared only that the Statute might hinder some possible legal change from the existing practice of unilateral amendment requests to a procedure in which the provinces could play a substantial role. No authority and no specific statements or events are cited for this interpretation.

¹⁸⁰ The British North America Act, 1943 postponed any redistribution of seats in the House of Commons pending termination of the war. The British North America Act, 1946 altered the formula for reapportionment of House seats set up in the 1867 Act. The British North America Act, 1949 (No. 1) effected the inclusion of Newfoundland as a province. The British North America Act, 1949 (No. 2) gave the federal Parliament power to amend the constitution in certain respects. See *infra* notes 184-85 and accompanying text.

¹⁸¹ See *Constitutional Amendment References*, 39 N.R. at 204-05 (Majority Convention).

ments had on the interests of the provinces.¹⁸² But, as indicators of the accepted sources of legitimate constitutional change, it is noteworthy that in every case the federal authorities, themselves, justified their actions by reference to the insignificance of the changes the amendments worked on the basic features of the Constitution.¹⁸³ Thus the amendment of 1949, empowering the federal Parliament in certain cases to amend the Constitution, was defended largely in terms of the breadth of its exceptions, which excluded inter alia the powers of the provinces.¹⁸⁴ Indeed the 1949 amendment's exclusions may be argued to have "constitute[d] an admission by the federal Parliament itself of its incompetence to deal with such matters."¹⁸⁵

Therefore the procedures used to secure amendments since independence failed to support convincingly the legitimacy of unilateral federal constituent power. Moreover, in the same period the federal government consistently refused to seek an amending formula in the absence of unanimous provincial consent. Twice what appeared to be general agreement dissolved when a province withdrew its assent and, on each occasion, no further action was taken.¹⁸⁶ The repeated failure to achieve federal-provincial agreement on a domestic amending procedure over the last fifty years and the accompanying perception of constitutional stalemate are strong testimony to the prevailing understanding of what was required to institute legitimate constitutional change.¹⁸⁷

¹⁸² See *id.* at 272-74 (Dissent Convention).

¹⁸³ With respect to the amendment of 1943, see G. FAVREAU, *supra* note 14, at 13; P. GERIN-LAJOIE, *supra* note 14, at 13; Note, *The Latest Amendment to the British North America Act*, 24 CAN. B. REV. 609, 612-13 (1946). The record with respect to the amendment of 1949 effecting the union with Newfoundland is more ambiguous. However, the inclusion of Newfoundland in the confederation by order-in-council had been authorized by section 146 of the original 1867 Act. Thus although the actual union departed, in some ways, from the arrangements originally contemplated, the action still had some sanction in the Act. A motion in the Canadian House in 1949 to consult the provinces was defeated. In the Senate a government spokesman referred to union as a "matter of national concern . . . assigned by the Constitution to the federal authority." P. GERIN-LAJOIE, *supra* note 156, at 121-29. As to the second amendment of 1949, see *infra* notes 184-85 and accompanying text.

¹⁸⁴ See GERIN-LAJOIE, *supra* note 156, at xvi-xxi.

¹⁸⁵ *Id.* at xxxii.

¹⁸⁶ *Constitutional Amendment References*, 39 N.R. at 205; P. HOGG, *supra* note 33, at 21.

¹⁸⁷ In addition to the failed attempts to agree on an amending formula, the refusal of the federal government to go forward with substantive amendments in the absence of unanimous agreement illustrates the same point. The Amendment of 1940, vesting in the federal Parliament the power to institute a scheme of unemployment compensation, was delayed more than two years while the necessary unanimity was secured. See *Constitutional Amendment References*, 39 N.R. at 204 (1981) (Majority Convention); P. GERIN-LAJOIE, *supra* note 156, at 106-08.

Professor Knopff put the point clearly, speaking in terms of the existence of a convention of provincial consent:

When Prime Minister Trudeau announced his government's initiative on national television, for example, he spoke of "the tyrant" of unanimity as the chief cause of

4. The Accord of November 1981

a. Debate and Consensus

The insistence of federal officials on proceeding with a method of patriation which was valid according to formal legal rules, but vulnerable to substantial arguments of illegitimacy produced a protracted, confusing and often virulent debate on the constitutional underpinnings of the Canadian political and legal system.¹⁸⁸ While either unanimous provincial agreement or unilateral federal action would have been fairly easy to evaluate in terms of constitutional legitimacy, the process and result which finally emerged from that debate is not susceptible to so obvious a judgment. The final agreement (approved with minor modifications) was among the federal government and nine provincial governments omitting only, but significantly, the government of Quebec.¹⁸⁹ This agreement, however, was not entirely the result of free bargaining because it took place against the background of the federal government's continuing expressed intention to take the matter to London on its own.¹⁹⁰ Therefore the resulting constitutional arrangements are subject to continuing questions of legitimacy.

These questions cannot focus exclusively on the final decision-making conference. The agreement concluded there is properly understood only as the culmination of a process which took more than a year. The main ingredients of that process can be roughly listed to give an idea of its character. The Federal Provincial Conference of September 1980 arose out of the Quebec referendum on "sovereignty-association." That referendum was, itself, a traumatic event for Canadian politics, concentrating the national attention on matters of constitutional self-definition.¹⁹¹ The unilateral federal initiative that followed the failure of the 1980 conference began an extensive national discussion. The proceedings in the federal Parliament contributed to that discussion in at least two ways. The reference of the government's proposed resolution to a special joint House-Senate Committee resulted in lengthy and widely publicized hearings. These provided a forum for detailed and many-sided arguments about the nature of Canadian legal and political values. All kinds of interests, economic, racial, cultural, philosophic and political, sent representatives to this unusual seminar.¹⁹² As a result, the government's proposed

"fifty-three years of constitutional paralysis" and insisted that a solution required that the tyrant be deposed. But one need not (indeed one cannot) depose a tyrant who is not in power.

Knopff, *supra* note 8, at 43.

¹⁸⁸ Cairns, *The Politics of Constitution-Making*, *supra* note 151.

¹⁸⁹ Government of Quebec, Decree No. 3214-81 (Nov. 25, 1981).

¹⁹⁰ See Cairns, *supra* note 20, at 21-22, 37-38.

¹⁹¹ R. ZUKOWSKY, *supra* note 8, at 32-33.

¹⁹² *Id.* at 73; Strayer, *supra* note 34, at 3-4.

Charter of Rights underwent substantial changes.¹⁹³ The other contribution was the debate in the House of Commons. At the very outset, the government modified its resolution to gain the support of the House's third party.¹⁹⁴ Subsequently the opposition pressed parliamentary procedure to its limits to emphasize its objections to the plan. These objections centered, above all, on the legitimacy of the process employed.¹⁹⁵

Concurrently with the debate in Parliament, the dissenting provincial governments carried out their own campaign of opposition. Theirs was no easy alliance. Despite common opposition to the federal plan, these provincial leaders had to debate and reconcile their own visions of Canada which were, by no means, in harmony.¹⁹⁶

The opposition of the provincial governments included the institution of reference lawsuits in the Courts of Appeals of three provinces. This resulted in decisions adverse to the provincial position in two cases and favorable in a third.¹⁹⁷ The latter judgment, in conjunction with the parliamentary tactics of the federal opposition, contributed to an agreement by the federal government to postpone final action in Parliament until the Supreme Court of Canada could render its opinion on the appeal.¹⁹⁸ That heteroclite judgment provided a critical element in the political process leading to the final agreement. The Supreme Court judgment strengthened the hand of the federal government by endorsing the legal-

¹⁹³ R. ZUKOWSKY, *supra* note 8, at 81-82.

¹⁹⁴ Within days after the federal initiative was announced, the government at the request of the parliamentary leader of the New Democratic Party made changes further strengthening provincial control over natural resources. In return, the Federal New Democratic Party caucus supported the government position for the remainder of the process. *Id.* at 69.

¹⁹⁵ The leader of the opposition summarized his position this way:

We in this party stood against [the government's constitutional] proposal because that proposal was wrong for two fundamental reasons: First, that proposal breaks the principle of partnership in this country. We are a federal nation, that is the history and nature of Canada and you are not a federal nation in fact and in spirit if you give, as Mr. Trudeau wants to give, the power to one level of government, Ottawa, to change the fundamental law of the land without any recourse at all to [the provinces]. . . . Secondly, their measure is wrong because it asks the British to decide questions which the people of this country should decide. . . . Mr. Trudeau and Mr. Chretien have indicated they are going to try to push stubbornly on, against the opposition of the provinces, against the opposition of the public, to try to change the Constitution in the personal way that Mr. Trudeau wants it changed.

Address by the Rt. Hon. Joe Clark to the Nova Scotia P.C. Annual Meeting (Jan. 17, 1981).

¹⁹⁶ R. ZUKOWSKY, *supra* note 8, at 92; Cairns, *supra* note 20, at 17-20.

¹⁹⁷ Judgments favorable to the federal position were rendered in Reference Re Amendment of the Constitution of Canada, [1981] 2 W.W.R. 143, 7 Man. 2d 269, and Reference Re Amendment of the Constitution of Canada, 120 D.L.R.3d 385 (Que. Ct. App. 1981). A judgment favorable to the opposing provinces was rendered in Reference Re Amendment of the Constitution of Canada, 29 Nfld. & P.E.I. 503, 82 Atl. Prov. 503, 118 D.L.R.3d 1 (Nfld. Ct. App. 1981).

¹⁹⁸ R. ZUKOWSKY, *supra* note 8, at 104.

ity of its proposed action. But, in finding that it would amount to a breach of a constitutional convention, it drastically increased the force of the argument that such action was illegitimate. As one opinion noted, conventions exist precisely "to ensure that the legal framework of the Constitution will be operated in accordance with the prevailing constitutional values or principles of the period."¹⁹⁹ This kind of inquiry was, to say the least, an odd one for a court of law.²⁰⁰ But once the judgment was rendered it became extremely influential in the subsequent course of events. This may have been due to the Court's prestige, acquired in ordinary adjudication, or to a perception of the Court as the only agency capable of intelligent and dispassionate consideration of the nature of constitutional change. Whatever the reason, the Court's decision and reasoning became an important part of the standards by which the legitimacy of any scheme for constituent action would be judged by the other relevant political actors.²⁰¹

All of these events were accompanied by an unending stream of commentary and criticism, academic and journalistic, in every form of the popular media.²⁰² The result was a long, loud and intense national symposium on the constitutional fundamentals of the Canadian state. It would be hard to imagine a process in which so many viewpoints were expressed and taken seriously in so many different forums. It seemed that every interest and argument were constantly colliding at different speeds and angles with every other interest and argument. Every position was challenged and, to some degree, refuted by the others. The constitutional rules which emerged from this apparently chaotic process reflect their multilateral formation. Finally, an entrenched constitutional system emerged which was in its substantive terms only slightly different from what had generally been perceived as the Canadian status quo before the constitutional debate.²⁰³

This was certainly not a rational constitutional reform imposed by a single guiding intelligence.²⁰⁴ But a cogent challenge to the new constitu-

¹⁹⁹ *Constitutional Amendment References*, 39 N.R. at 192 (Majority Convention). See Banting & Simeon, *Federalism, Democracy, and the Constitution*, in *AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT 2, 7* (K. Banting & R. Simeon eds. 1983); Strayer, *supra* note 34, at 3-21 to 3-31.

²⁰⁰ See Kay, *supra* note 34. But see Colvin, *supra* note 34.

²⁰¹ See Kay, *supra* note 34, at 32-33; Cairns, *The Politics of Constitution-Making*, *supra* note 151; Russell, *supra* note 147, at 210.

²⁰² R. ZUKOWSKY, *supra* note 8, at 124; Cairns, *The Politics of Constitution-Making*, *supra* note 151.

²⁰³ See Cairns, *supra* note 20, at 29; Cairns, *The Politics of Constitution-Making*, *supra* note 151. This in no way alters the fundamental character of the change made by specifying a preconstitutional rule. See *supra* notes 40-41 and accompanying text.

²⁰⁴ Cairns states:

[T]hose who seek the guiding spirit or the real intentions of the Fathers of our limited re-Confederation will search in vain for a dominant animating vision. There is none to be found. The Constitution Act does not transcend competing

tion's legitimacy is not thereby advanced. As Burke argued, while *a priori* constitutions may appear appealing in the abstract, the merits of a new constitution rest in its fit with the flesh and blood people who must live under it.²⁰⁵ Given the terminology defined above, only that fit supports a claim that basic constitutional rules are legitimate.²⁰⁶ The constitutional change in Canada in 1980-82 mirrored the full range of disagreements and contradictions of Canada because it came out of a process which was molded by those contradictions and disagreements.²⁰⁷

b. The Dissent of Quebec

One critical feature thus far omitted is the failure to secure the agreement of the government of Quebec. This opposition provides the basis for an assertion that the new Constitution is illegitimate. The political entity, Canada, has always been associated with both the amalgamation and the continued separate identities of its two principal language groups—English and French. The recognition of the need for French acquiescence in the shared institutions of government has historic roots, go-

visions of the country. It only entrenches them in the Constitution and provides new arenas in which the battles of the future will be fought.

Cairns, *supra* note 20, at 23. See *id.* at 27-28.

²⁰⁵ E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 37-38 (1797, Bobbs, Merrill ed., Mahoney ed. 1955).

²⁰⁶ See *supra* notes 24-33 and accompanying text.

²⁰⁷ See Banting & Simeon, *supra* note 199, at 25. The Constitution, as Professor Cairns noted, does not resolve, it "entrenches" those contradictions. See the quotation in *supra* note 204. Professor Cairns has analyzed the constituent process in two illuminating essays. See Cairns, *supra* note 20; Cairns, *The Politics of Constitution-Making*, *supra* note 151. His conclusions are less optimistic than those in the text. At one point he states: "To look back on the constitutional reform process is to be made depressingly aware of the intimate correlation between the substance of the various constitutional packages and the interests present or absent at their creation." Cairns, *The Politics of Constitution-Making*, *supra* note 151. That there was such a correlation there can be no doubt. Whether or not awareness of it is depressing is less clear. Professor Cairns has expressed concern that the process involved exclusively the leaders of governments and that their disagreements "did not reflect socio-economic or other divisions in society which were then manifested in elite intransigence, but political divisions between members of federal and political elites themselves." *Id.* See Leach, *Implications for Federalism of the Reformed Constitution of Canada*, 45 LAW & CONTEMP. PROBS. 149, 155 (1982). Ordinarily, however, we do expect our social and economic interests to be, at least, roughly mirrored in our representative institutions. It is true that unlike the 1787-89 events in the United States, the 1980-82 process was carried on through pre-existing political channels. It is not certain, however, that the same kind of extraordinary action would have been deemed more legitimate in Canada, in light of the historical traditions of Canadian government. See *supra* notes 134-37 and accompanying text. In any event, as Professor Cairns has noted, see *supra* note 20, at 21-22, 37-38, the introduction of the threat of unilateral action by the federal government did stimulate the kind of exceptional national debate described in the text. That experience is not easily described as another rendition of the same old political game. See Banting & Simeon, *supra* note 199, at 2-8.

ing back to the Quebec Act of 1774.²⁰⁸ That recognition was surely an important influence in the original confederation of 1867. The constitution of the preceding colonial legislature of the United Province of Canada, comprising what is now Ontario and Quebec, required equal representation for Upper (Ontario) and Lower (Quebec) Canada. The population-based apportionment of the new central parliament was acceptable to the French only because the new provincial government of Quebec would be largely autonomous in matters of religion, education, civil law and domestic institutions—subjects of particular concern to the French-speaking inhabitants.²⁰⁹ The presence of an irreducible French fact in Canadian politics has never since been absent. If anything, in recent decades it has become more pronounced. Its clearest expression was in the report of the Royal Commission on Bilingualism and Biculturalism, issued in the late 1960's, which effectively endorsed the concept of "two nations" coexisting within the Canadian polity.²¹⁰ The federal government appeared to embrace this notion by following through with legislation aimed at a thorough-going bilingualism in all federal institutions.²¹¹

Although the idea that Canada is the result of a compact among the provinces has been controversial,²¹² the suggestion that a continuing accord exists among the two language groups has been much more hospitably received.²¹³ This history makes plausible the contention that any constitutional arrangements imposed in the teeth of widespread French opposition would be inconsonant with generally accepted aspects of the Canadian state and thus, illegitimate.

After the agreement of November 1981, an analogous question was put before the Supreme Court of Canada in the constitutional reference brought by the Province of Quebec. The province argued that the action

²⁰⁸ See K. McNAUGHT, *supra* note 154, at 50.

²⁰⁹ See *id.* at 122-23; D. CREIGHTON, *THE ROAD TO CONFEDERATION*, 145 (1964); P. HOGG, *supra* note 33, at 33; W. LEDERMAN, *supra* note 34, at 48, 58-59.

²¹⁰ See K. McNAUGHT, *supra* note 155, at 309.

²¹¹ McConnell, *Cutting the Gordian Knot: The Amending Process in Canada*, 44 *LAW & CONTEMP. PROBS.* 195, 199 (1981).

²¹² See *supra* note 157 and accompanying text.

²¹³ Corry states:

However, if we speak in moral rather than in strict legal terms, there is ground for saying the confederation was a compact, not between the several provinces but between the two races English and French, which agreed to associate together in the Dominion of Canada on terms of mutual tolerance and respect. The most important reason for a federal union rather than a unitary one was that a unitary state was entirely unacceptable to French-speaking Canadians. They were willing to come in only on condition that matters affecting language, religion and basic social relationships were exclusively reserved to the provinces. It might not be a breach of contract but it would be a breach of faith now to insist on withdrawing such matters from jurisdiction of the provinces without their consent.

J. CORRY, *DEMOCRATIC GOVERNMENT AND POLITICS* 375-76 (1946), *quoted in* P. GERIN-LAJOIE, *supra* note 156, at 214. See also *id.* at 177; K. McNAUGHT, *supra* note 155, at 131-32; Malloy, *The Politics of Constitutional Change*, 45 *LAW & CONTEMP. PROBS.* 53, 65-66 (1982).

of the federal Parliament, based on that agreement, was in violation of a constitutional convention because it was opposed by the government of Quebec. That contention was rejected in a unanimous opinion.²¹⁴ The Court's conclusion was based on its finding that the province had not shown that the claimed convention met all three strictly defined criteria. That is, the Court answered the narrow question, "Is there a convention?" and not the broader one, "Is this process legitimate?"²¹⁵

Any argument that a process which omits the participation and agreement of representatives of French-speaking Canadians could be a legitimate basis for the Constitution of Canada is extremely weak. The actual question is much more complicated. French Canadians, for the purpose of this inquiry, may not be synonymous with Quebec.²¹⁶ This seems particularly clear in light of the fact that the dissenting Quebec government was elected in a campaign from which it had expressly excluded its own constitutional argument for Quebec sovereignty. In fact, French Canadians participated vigorously in the constitutional debate. The federal parliamentary majority, which passed the federal initiative over Quebec's opposition, was composed substantially of French-speaking members from Quebec under the leadership of a French-Canadian Prime Minister.²¹⁷ All of this undercut the claim that the new Constitution was

²¹⁴ Attorney-General of Quebec v. Attorney-General of Canada, 140 D.L.R.3d 385 (Can. 1982) [hereinafter cited as *Quebec Reference*].

²¹⁵ *Id.* at 393-404. It is worth remarking how, in only its second expedition into the problematic world of adjudicating the existence of constitutional conventions, the Court adopted with little discussion, a rigid, almost canonical, view of the criteria to be met by a would-be convention, based on the definition offered by Sir W. Ivor Jennings in his *LAW AND THE CONSTITUTION* (5th ed. 1959), quoted in *Quebec Reference*, 140 D.L.R.3d at 393. So completely were these standards accepted, that the question of whether Quebec consent met one of them (whether the actors in prior precedents believed they were bound by the rule) was addressed by a close analysis of Jennings' text, scrutinizing and parsing it as if it were a statute. *Id.* at 403-04. The need that the Court clearly felt to assimilate this concededly unenforceable obligation to ordinary rules of law raises again questions about the fitness of judicial resolution of such matters. See Kay, *supra* note 34, at 28-29; Hogg, Casenote, 60 CAN. B. REV. 307, 320-24 (1982).

²¹⁶ Certainly the policy of the federal government under Prime Minister Trudeau has been to make Canada a country, in all parts of which, French speakers could be comfortable, and to undermine the idea that French Canada was found in Quebec alone. See Banting & Simeon, *supra* note 199, at 12; Cairns, *supra* note 20, at 31-34. Still, the claim that the province of Quebec is the best institutional representative of French Canadians in the confederation is a strong one. Counsel for Quebec in the Quebec Reference quoted the Task Force of Canadian Unity which described Quebec as "the stronghold of the French-Canadian people" and "the living heart of the French presence in North America." Factum of the Attorney-General of Quebec, translation quoted in *Quebec Reference*, 140 D.L.R.3d at 401. On the possible consequences for Canadian unity of the exclusion of Quebec from the constitutional agreement, see Bergeron, *Quebec in Isolation*, in *AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT 59* (K. Banting & R. Simeon ed. 1983).

²¹⁷ In the 32nd Parliament, which passed the Constitutional resolutions, the Liberals controlled 146 seats out of 281 in the House of Commons. There were 75 members from Quebec who were overwhelmingly Liberals. Prime Minister Trudeau represents the riding of

the product of a process which was illegitimate by virtue of the failure to secure the agreement of the government of Quebec.

Indeed, the uncertainty as to constitutional legitimacy resulting from doubts about French acceptance is exemplary of a more general problem. The acquiescence of French Canadians is not something which can be known immediately and there is no formula for ascertaining it. It can only be estimated as events and attitudes unfold over time.²¹⁸ But this is equally true of other segments and actors in Canadian society. Arguments about legitimacy cannot be based solely on the presence or absence of certain elements at a particular moment in time. That aspect of contentions concerning legitimacy will be next considered.

VI. THE TEMPORAL NATURE OF LEGITIMACY

Those persons, if any who did give their consent formally, are all now dead. . . . *And the Constitution, so far as it was their contract, died with them.* They had no natural power or right to make it obligatory upon their children.

Lysander Spooner, 1870²¹⁹

The discussion up to this point may have been misleading in emphasizing facts, events and attitudes existing at discrete periods in the past. This may have suggested that an assertion of legitimacy is premised solely on a critical examination of this kind of material, evaluated according to abstract and ahistorical standards, and that the legitimacy of the constituent process thus would be determined once and for all. But questions about constitutional legitimacy, in the sense used here, cannot be so narrowly confined in time. Assertions about the legitimacy of the rules which control a legal system will turn on the acceptability of the substance and origins of those rules to participants in the legal system. Furthermore, that acceptability is always a *current* acceptability. The legitimacy of the Constitution of the United States in 1984 cannot be debated on the limited basis of the events and circumstances of 1787-89 without

Mount Royal in Montreal. CANADIAN ALMANAC AND DIRECTORY 512 (1983).

²¹⁸ If there exist two sets of political values in the French and English communities so basically at odds that no set of constitutional arrangements is likely to secure the adherence of the relevant actors in both communities, a plausible argument is possible that no preconstitutional rule is legitimate for that polity historically known as Canada which definitionally includes significant French and English populations. See C. FRIEDRICH, *supra* note 34, at 237, 239; Stillman, *supra* note 34, at 43 ("Indeed, since legitimacy is related to the value patterns of a society, it is possible to imagine a society in which legitimacy could not exist because the society's value pattern is bifurcated, too chaotic, or too contradictory, or especially because different portions of society strongly hold different value patterns with different key values, as in the United States in 1860-61, Pakistan in 1971-72, and Northern Ireland still").

²¹⁹ L. SPOONER, NO TREASON: THE CONSTITUTION OF NO AUTHORITY 11 (1870, reissued 1973).

considering attitudes and values in the United States in 1984. A Constitution which we can be reasonably sure was immune to a claim of illegitimacy in the tenth year of its existence may, because of changed perceptions, be cogently attacked as illegitimate in its hundredth year.

None of this is to say that the circumstances surrounding the promulgation of constitutional rules are irrelevant to disputes about legitimacy. Those circumstances will probably be an important factor in shaping the perceptions which are critical to claims of legitimacy in future periods. The participants in a legal system will constantly judge the acceptability of its fundamental rule, partly, on the basis of their understanding of the propriety of the process that brought it about. Thus a basic rule, understood to originate in divine revelation, may continue to be regarded as legitimate only so long as the appropriate members of society continue to believe that they are obliged to conform to divine commands. When that underlying belief dissolves, the preconstitutional rule legitimated by it will be more vulnerable to criticism. Then, either some other justification for accepting the rule will develop or the rule will no longer govern the legal system.²²⁰ This appears to be what happened in Canada as it evolved to independence. The prior legitimating event, the enactment by the United Kingdom Parliament of the British North America Acts, ceased to be adequate in light of new political realities. What will be seen as legitimate origins for constitutional rules, and for how long, are questions that depend upon the social, intellectual and political changes in a society. A new regime may arise through royal decree, through charismatic leadership, through violent revolution, through spontaneous democratic assemblies or through quiet political agreements. The extent to which the products of any of these processes will arouse complaints of illegitimacy will certainly change with the times.

In making an estimate of the likelihood that such criticism will emerge, it is necessary to consider several factors. First, will be the probability that the procedure which gave birth to the constitutional regime will be regarded (or remembered) as appropriate. Beyond that, however, it will be necessary that the content of the rules created maintain a minimum fit with the social requirements of the society whose law it governs.²²¹ At some point even a rule promulgated in a manner still deemed unexceptionable will fail to satisfy the practical demands made upon the legal system and be open to doubts as to its legitimacy in the context of

²²⁰ This is another way of saying that a new legal system has been established. The "old" preconstitutional rule is, then, no more than a historical artifact. See H. HART, *supra* note 24, at 117. In the terminology used in the text, a constitutional rule based on it would be subject to charge of illegitimacy, although its formal legality remained unimpaired. See *supra* notes 132-38 and accompanying text for a discussion of the colonial authority of the United Kingdom over Canada. See also Finnis, *supra* note 19, at 67-68; Remillard, *supra* note 34, at 194; cf. Russell, *supra* note 147, at 218.

²²¹ See Postema, *supra* note 32, at 178.

new social and political facts.²²²

Moreover, the apparent legitimacy of a given constitutional regime will, in some measure, be generated by its own momentum. That is, a given fundamental constitutional rule will be accepted simply by virtue of its acknowledged status over time. In such cases, the events which generated it may acquire respectability from the Constitution instead of the other way around.²²³ So long as constitutional arrangements perform their function fairly well, roughly coincide with the values and needs of the society and are not perceived as originating from an affirmatively perverse source, their legitimacy is unlikely to arise as a serious question.²²⁴ The costs of a major and overt re-examination and redefinition of the underlying political premises of a legal system are so substantial that such a process will not be undertaken frequently.²²⁵ The authors of the Declaration of Independence were undoubtedly right in claiming that "all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed."²²⁶

The process by which a Constitution of questionable legitimacy and certain illegality may, nevertheless, come to be firmly established as legitimate is illustrated by the swift transformation of the Constitution of the United States into a virtually universally revered source of authority. Although the Constitution concededly was illegal in its inception and ratifi-

²²² This will more certainly be the case if the preconstitutional rule provides static, inflexible criteria of validity as would be the case when it specifies conformity to an unamendable written constitution. Whether a radically amended constitution could be defended as legitimate under the same standard of legitimacy as earlier versions is a difficult question, particularly when the earlier amending formula is, itself altered. See Ross, *supra* note 43.

²²³ Olivecrona suggests that the Roman legal system was founded originally on a presumed religious obligation:

Over a period of several hundred years great changes in the psychological bases of the constitution necessarily took place. When government has been carried on for a long time according to a set of rules, such rules are supported by habits of thought and many other factors. The old creed may be undermined and the ritual acts reduced to mere formalities; but for numerous reasons respect for rules may never-the-less be upheld and the forms reverently observed.

K. OLIVECRONA, *supra* note 24, at 103; cf. W. LEDERMAN, *supra* note 34, at 32-33; Hyde, *supra* note 34, at 411.

²²⁴ See Postema, *supra* note 32, at 178-89.

²²⁵ The existing Constitution acquires a presumption in its favor merely by being the status quo. Thus, Dicey believed that it was only *changes* in the Constitution which ought to be referred to the extraordinary judgment of the people. See *supra* note 150. In a more practical sense the persistence of a Constitution over time is sure to result in the entrenchment of interests that will present obstacles to any serious reconsideration. This tendency, of course, is accentuated when the same political interests are the most likely initiators of constitutional change. See Cairns, *supra* note 20, at 40-43.

²²⁶ Declaration of Independence, para. 2. (U.S. 1776). The factors referred to in the text, therefore, involve a rough combination of what Weber described as the "legal" and "traditional" bases of legitimacy. See M. WEBER, *supra* note 35, at 324-29, 382-86.

cation, its authority was justified on the basis of the political sanction provided by the approval of "the people."²²⁷ But a contemporary observer surely would have been skeptical about the prospects for general acceptance. The intensity of passion aroused by the debate over both the legitimacy of the constituent process and the character of the new constitutional rules is hard to overestimate. Governor Clinton of New York was not particularly extreme in his criticism when he charged that the Constitution "was founded in usurpation."²²⁸ The claim was not infrequently made that the Constitution was the result of a conspiracy by the wealthy to betray the Revolution and impose an aristocratic government.²²⁹ "If we are to listen to the participants," one commentator has written, "the struggle over the Constitution was a dispute between contending social interests over a question no less vital than the future of republican government in America and the world."²³⁰ Given this level of argument, given the questionable tactics often used in the ratifying conventions,²³¹ and given the closeness of the result in some of the critical states,²³² it is something of a wonder that within a very few years the Constitution was embraced, not grudgingly, but often with near veneration by the very people who had so violently denounced it.²³³ The issue of legitimacy rapidly disappeared.

A number of reasons explain the quick acceptance of the Constitu-

²²⁷ See *supra* notes 105-11 and accompanying text.

²²⁸ Quoted in M. JENSEN, *supra* note 51, at 145.

²²⁹ See L. BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 115 (1978). The complete writings of the anti-Federalists have recently been compiled in seven volumes. *THE COMPLETE ANTI-FEDERALIST* (H. Storing ed. 1981). A useful collection of such writings is *THE ANTI-FEDERALISTS*, *supra* note 70. One writer has commented that "the ratification controversy was a struggle between contending social interests calling forth an intensity of rhetoric seldom equalled in American disputes." L. BANNING, *supra*, at 105.

²³⁰ See Banning, *Republican Ideology and the Triumph of the Constitution 1789-93*, 31 *WM. & MARY Q.* 167 (1974).

²³¹ See generally J. MAIN, *supra* note 122, at 187-248.

²³² See *id.* at 249; C. BEARD, *supra* note 60, at 237-38.

²³³ Banning states:

The quick apotheosis of the American Constitution was a phenomenon without parallel in the Western world. Nowhere has fundamental constitutional change been accepted with so much ease. Nowhere have so many fierce opponents of a constitutional revision been so quickly transformed into an opposition that claimed to be more loyal than the government itself.

Banning, *supra* note 230, at 167.

See Elkins & McKittrick, *The Founding Fathers: Young Men of the Revolution*, in *THE RE-INTERPRETATION OF THE AMERICAN REVOLUTION, 1763-1789*, at 379-95 (J. Greene ed. 1968). The collapse of the anti-Federalist position is illustrated by the case of Luther Martin of Maryland, a member of the Constitutional Convention who denounced the new Constitution savagely in the subsequent ratification debate, see *supra* note 118, and who, shortly afterwards, became known as the Federalist "bull-dog." See Roche, *The Founding Fathers: A Reform Caucus in Action*, in *THE RE-INTERPRETATION OF THE AMERICAN REVOLUTION, 1763-1789*, at 436, 466 (J. Greene ed. 1968); Schechter, *The Early History of the Tradition of the Constitution*, 9 *AM. POL. SCI. REV.* 707 (1915).

tion. For all its defects the ratification process stimulated as extensive and thorough a national debate as could exist in that period and in those circumstances. And the approval of the state conventions was also—again in the context of those times—about as democratic a procedure as could be devised. Thus, the practically universal recognition of the ultimate sovereignty of the people provided a powerful reason for accepting the people's verdict and getting on with other national business.²³⁴ Furthermore, the actual governmental arrangements which the new Constitution established were not so radical as to place them outside of generally accepted notions of republican government.²³⁵ The consequence of both of these factors was that, despite the Anti-Federalists' protestations to the contrary and the vehemence of their arguments, the differences, both as to the manner in which the new Constitution was created and the main features of the system which it instituted, were not differences of deep principle.²³⁶

Once the constitutional government was in place, its advantages and disadvantages, relative to reasonably possible alternatives, must have been seen rather differently. One historian has argued that the classical political orientation of the Anti-Federalist statesmen resulted in a conviction that constitutional changes were always for the worse and that the protection of liberty now depended on a scrupulous adherence to the newly established constitutional rules.²³⁷ Whatever the precise reasons, perceptions changed once the Constitution achieved the privileged position of *status quo*. Now the burden of proof on the question of legitimacy would rest on those who would challenge the existing constitutional rules. In that sense, the Constitution became more secure with every year.

It is true, of course, that the Constitution was to suffer more than one challenging jolt in the subsequent course of American history. Most

²³⁴ Ely states:

The Declaration of Independence had not been ratified at all, and the Articles of Confederation had been ratified by the various state legislatures. The Constitution, however, was submitted for ratification to "the people themselves" actually to "popular ratifying conventions" elected in each state. A few spoilsports pointed out that this was not significantly more "democratic" than submitting the documents to the legislatures (since the conventions themselves would necessarily be representative bodies and much the same cast would likely be chosen as the people's representatives). But the symbolism was important nonetheless It is also instructive that once the Constitution was ratified, virtually everyone in America accepted it immediately as the document controlling its destiny. Why should that be? Those who had opposed ratification certainly hadn't agreed to such an arrangement. It's quite remarkable if you think about it and the explanation has to be that they accepted the legitimacy of the majority's verdict.

J. ELY, *supra* note 121, at 5-6; see L. BANNING *supra* note 229, at 106; M. DIAMOND, *supra* note 75, at 54; Banning, *supra* note 230, at 169.

²³⁵ See Banning, *supra* note 230, at 169.

²³⁶ See L. BANNING, *supra* note 229, at 106; Elkins & McKittrick, *supra* note 233, at 395.

²³⁷ See Banning, *supra* note 230, at 177-87.

obvious is the political and human cataclysm of the Civil War from which the Constitution emerged significantly changed. Even in the critical debates leading up to the war, proponents of each position often grounded their arguments in an interpretation of the Constitution.²³⁸ Even secession, itself, was sometimes justified as consistent with the constitutional scheme of 1787.²³⁹ That question of constitutional construction having been settled by the war, the legitimacy of the Constitution was enhanced.²⁴⁰ Reverence for the constituent process was, and continues to be, a significant part of the regard which the Constitution enjoys. Serious, and occasionally violent, constitutional differences have occurred but these are matters arising within a common allegiance to what is almost universally regarded as the binding law of the Constitution. Its authority has been treated as Jefferson found it treated in France in the debates of the National Assembly, "like that of the Bible, open to explanation, but not to question."²⁴¹ "The divine right of kings never ran a more prosperous course than did the unquestioned prerogative of the Constitution to receive universal homage."²⁴²

²³⁸ See H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 115-231 (1982). This is not to say that certain participants did not, sometimes, reject wholesale the authority of the Constitution. While some abolitionists attempted a constitutional argument against slavery, see R. COVER, *JUSTICE ACCUSED* 154-58 (1975), others denounced the Constitution and its rather explicit protection of slavery. See *id.* at 150-54. Among the most prominent of these was William Lloyd Garrison. His view is illustrated by a speech he gave on July 4, 1854, in Framingham, Massachusetts, described by Phillip S. Paludan:

Then he reached for a copy of the Constitution, held it in his hand and declared that it was the "parent of all the other atrocities." "A covenant with death," he called it, "An agreement with hell." He set it afire and cried out as it burned, "So perish all compromises with tyranny! 'And let the people say Amen.'" A huge shout of "Amen" echoed. But this time hisses and angry outcries were also audible.

P. PALAUDAN, *A COVENANT WITH DEATH* 3 (1975).

²³⁹ See H. HYMAN & W. WIECEK, *supra* note 238, at 208-15. In his inaugural address to the Confederate Provisional Congress in Feb. 1861, Jefferson Davis cited the Declaration of Independence but also insisted that the secession and formation of a new southern government had "not proceeded from a disregard on our part of just obligations, or any failure to perform every constitutional duty." It was only "by abuse of language that their act has been denominated a revolution." JEFFERSON DAVIS AND THE CONFEDERACY AND TREATIES CONCLUDED BY THE CONFEDERATE STATES WITH INDIAN TRIBES 10 (R. Gibson ed. 1977). An explicit post-war refutation of this position is *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869).

²⁴⁰ See Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1303-05 (1937).

²⁴¹ Thomas Jefferson to James Madison (Aug. 28, 1789), reprinted in 3 THE WRITINGS OF THOMAS JEFFERSON 96, 99 (H. Washington ed. 1861); see Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 356-57 (1981), and sources cited in *id.* at 356 nn.23-24.

²⁴² Corwin, *The Worship of the Constitution*, in 1 CORWIN ON THE CONSTITUTION 47 (Loss ed. 1981) (quoting Woodrow Wilson). See Cahow, *Comparative Insights into Constitutional History: Canada, The Critical Years*, 45 LAW & CONTEMP. PROBS. 33, 40-42 (1982); Hamilton, *Constitutionalism*, in 4 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 225 (1937); Monaghan, *supra* note 241. Of course, the occasional, idiosyncratic attack on the legitimacy of the Constitution is not unknown in American history. See *supra* note 238; L. SPOONER,

This is not to say that a similar process is confidently to be expected in Canada. Whether or not the new Constitution will suffer continuing doubts on the score of legitimacy depends on a continued widely-held understanding of the propriety of the constituent process and the suitability of the new ultimate legal authority it created. In judging both these factors, the acquiescence or disaffection of French Canadians is likely to be crucial, and the bitter rejection of both the manner and content of the agreement of November 1981 by the government of Quebec will be a factor in determining the likelihood that a substantial challenge can be raised.²⁴³

But it is too early to be pessimistic about the legitimacy of the Canadian Constitution. The course of events resulting in the creation and maintenance of the Constitution of the United States make this clear.²⁴⁴ The discussion of the events of 1980-82 reveal reasons to hope that the new Canadian Constitution will acquire and maintain general acceptance. The procedures which led up to the Constitution, while without exact precedent, can be defended as both fair and representative of all important Canadian interests. That process, moreover, filtered out most features which would have provoked extreme opposition from any significant segment of Canadian society. It established constitutional rules which embody no drastic departure from the inarticulate understanding of constitutional authority which had been assumed for some time.²⁴⁵ It thus has many of the advantages which contributed to the success of the American "coup d'état" of 1787-89.

Since arguments about legitimacy depend upon current attitudes and actions, the historical origins of a constitutional regime cannot exhaust the topics which figure in such arguments. They comprise only one element influencing those attitudes and actions. Indeed, every legal system is, in this sense, always being chosen, and is always at the risk of being rejected.²⁴⁶ Often when basic constitutional rules are rejected and new ones established, the change is masked by the existing legal forms and formulas which remain unchanged.²⁴⁷ In Canada in 1980-82 and in the

supra note 219.

²⁴³ Quebec's Premier Rene Levesque declared after the November agreement that "[t]here is no possibility for a self-respecting Quebec government to accept such a development." *Toronto Globe & Mail*, Nov. 6, 1981, at 12. Moreover, he referred to the process of negotiation and agreement as "farce and trickery." *Id.*, Nov. 10, 1981, at 1; see McConnell, *supra* note 8, at 216, 229.

²⁴⁴ See *supra* notes 47-127. Professor Knopff and Mr. Strayer have already noted the parallels between the United States constituent process of 1787-89 and that in Canada in 1980-82, in terms of the distinction between strict legality and ultimate political acceptance. See Knopff, *supra* note 8, at 61-62, 64-65; Strayer, *supra* note 34, at 3-4.

²⁴⁵ Cairns, *supra* note 20, at 39.

²⁴⁶ See Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 462-63 (1982).

²⁴⁷ It is hard to contest the claim that the governing rules of the legal system of the United States have changed significantly from the ideas of the framers and ratifiers of the

United States in 1787-89 a rare confluence of historical and political factors forced the process into the open and the debates on legitimacy became more explicit.²⁴⁸ The extraordinary national confrontations with fundamental constitutional needs and preferences followed.

This kind of unusual occurrence does not make the Constitution which results any less provisional. An inchoate challenge to constitutional arrangements based on a claim of illegitimacy is always lurking at the edges of any legal system. Whether concerns as to constitutional legitimacy will now dissolve or persist will depend on the character of the Canadian polity. The factors which will influence that result cannot be enumerated with any certainty. It was understood that the new Constitution Act would be just the first stage of substantive constitutional reform.²⁴⁹ The suitability of the amending power will be judged largely on its performance in carrying out that reform. The actions of the institutions of government, particularly the courts, implementing the constitutional scheme are likely to be critical. Perhaps most important will be whether or not the new constitutional arrangement will be given time to settle into the ordinary expectations of participants in the Canadian legal system and begin to influence, as well as be influenced by, the underlying political and social realities in Canada.

The formal change has been accomplished. However, that legal transformation is only the outer manifestation of less obvious social and political factors. Whether the formal change will so mirror a stable consensus in society as to make questions of legitimacy irrelevant cannot now be known.²⁵⁰ The real priorities were expressed astutely in an editorial cartoon published in the same newspaper issue as that in which the plans for the proclamation of the Constitution Act, 1982 were described. An apparently exhausted Canada, in the form of a beaver, reclines on a doctor's examining table. The physician leans over to give his somewhat equivocal conclusion: "Now that you have a Constitution," he tells his patient, "all you need is a heart."²⁵¹

Constitution, if in no other respect than in the recognition of the validity of constitutional rules promulgated by the United States Supreme Court that are not derived from the text of the Constitution. There seems no other conclusion but that the underlying preconstitutional rule has shifted to accommodate this. See Kay, *supra* note 28.

²⁴⁸ See Colvin, *supra* note 34, at 12.

²⁴⁹ Section 37 of the Constitution Act, 1982 required a constitutional conference of first ministers on the rights of aboriginal peoples. That conference was held on Mar. 15-16, 1983. An accord issuing from the conference proposed an amendment concerning native land claims and called for two more conferences in the following five years. Some commentators have expressed skepticism as to the likelihood of significant constitutional change in the near future. See Banting & Simeon, *Federalism, Democracy and the Future*, in *AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT* 348 (K. Banting & R. Simeon eds. 1983).

²⁵⁰ See Cahow, *supra* note 242, at 52.

²⁵¹ *Toronto Globe & Mail*, Mar. 27, 1982, at 6, col. 12.

